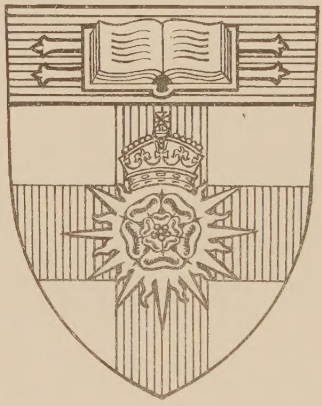
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346
Mx North Gallery



UNIVERSITY OF LONDON
LIBRARY

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR RICHARD E. WEBSTER, Knt., M.P. .	ATTORNEY-GENERAL.
SIR JOHN ELDON GORST, Knt., M.P. .	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT PULLING	Serjeants' Inn.
HORACE DAVEY, Esq., Q.C. ARTHUR KEKEWICH, Esq., Q.C.	Lincoln's Inn.
SIR JOHN BLOSSETT MAULE, Knt., Q.C. ARTHUR CHARLES, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. F. A. PHILBRICK, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie, Williams, & Williams), Lincoln's Inn Fields JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Son, & Coward), Mincing Lane, E.C.	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

LAW REPORTS.

360

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY.

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. WORSLEY KNOX, G. I. FOSTER COOKE,	*Barristers-at-Law.*
V.-C. Bacon	J. B. DAVIDSON, G. I. FOSTER COOKE,	*Barristers-at-Law.*
Mr. Justice Kay	T. F. MORSE, W. WORSLEY KNOX,	*Barristers-at-Law.*
Mr. Justice Chitty	F. G. A. WILLIAMS, GEORGE MURRAY	*Barristers-at-Law.*
Mr. Justice North	CHARLES MARETT H. L. FRASER,	*Barristers-at-Law.*
Mr. Justice Pearson	W. LLOYD CABELL D. PITCAIRN,	*Barristers-at-Law.*

VOL. XXX.

1885.—XLVIII. & XLIX. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1885.

BIBL. LONDIN UNIV

Lord Halsbury,	*Lord Chancellor.*
Lord Esher,	*Master of the Rolls.*
Sir Richard Baggallay,	*Lords Justices of the Court of Appeal.*
Sir Henry Cotton,	
Sir Nathaniel Lindley,	
Sir C. S. C. Bowen,	
Sir Edward Fry,	
Sir James Bacon,	*Vice-Chancellor.*
Sir E. E. Kay,	*Justices of High Court, attached to Chancery Division.*
Sir J. W. Chitty,	
Sir Ford North,	
Sir John Pearson,	
Sir Richard E. Webster,	*Attorney-General.*
Sir John Eldon Gorst,	*Solicitor-General.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1885, will be as follows:—

In the First Series,
28 Ch. D.

In the Second Series,
14 Q. B. D. 10 P. D.

In the Third Series,
10 App. Cas.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Ainslie, *In re.* Swinburn *v.* Ainslie – – – – 485
———, Swinburn *v.* *In re* Ainslie – – – – 485
Alexander *v.* Cross. *In re* Cousins – – – – 203
Andrews, *In re.* Edwards *v.* Dewar – – – – 159
Ashbury *v.* Watson – – 376
Asphaltic Wood Pavement Company, *In re.* Lee and Chapman's Case – – – – 216
Atkinson, *In re.* Atkinson *v.* Bruce – – – – 605
——— *v.* Bruce. *In re* Atkinson – – – – 605

B.

Badham, Bailey *v.* – – – 84
Bailey *v.* Badham – – – 84
Bannister, Wilks *v.* – – 512
Bethlehem and Bridewell Hospitals, *In re* – – – 541
Bridewell and Bethlehem Hospitals, *In re* – – – 541
Bruce, Atkinson *v.* *In re* Atkinson *v.* – – – – 605
Bruton, Tarleton *v.* *In re* Roberts – – – – – 234
Bryon, *In re.* Drummond *v.* Leigh – – – – 110
Burton, Galland *v.* *In re* Fawsitt 231

C.

Cannon, *Ex parte.* *In re* Leicester Club and County Racecourse Company – – – 629
Cardigan *v.* Curzon-Howe – 531
Cavendish *v.* Cavendish – – 227
Christmas, *In re.* Martin *v.* Lacon – – – – 544
Colonial Bank *v.* Whinney – 261

PAGE

Compton, *In re.* Norton *v.* Compton – – – – 15
———, Norton *v.* *In re* Compton – – – – 15
Coulman, *In re.* Munby *v.* Ross 186
Cousins, *In re.* Alexander *v.* Cross – – – – 203
Creyke, Dawes *v.* – – – 500
Crompton *v.* Jarratt – – 298
Cross, Alexander *v.* *In re* Cousins – – – – 203
Curzon-Howe, Cardigan *v.* – 531

D.

Danby (an alleged Lunatic), *In re* – – – – – 320
Davey, Whetham *v.* – – 574
Dawes *v.* Creyke – – – 500
Deakin *v.* Lakin. *In re* Shakespear – – – – – 169
Deane, McBean *v.* – – – 520
Delta Syndicate, Limited, *In re.* *Ex parte* Forde – – – 153
Dennis, Edwards *v.* *In re* Edwards' Trade-mark – – 454
Dewar, Edwards *v.* *In re* Andrews – – – – 159
Doggett *v.* Revett. *In re* Youngs 421
Drummond *v.* Leigh. *In re* Bryon – – – – 110
Dyke *v.* Stephens – – – 189

E.

Edwards *v.* Dennis. *In re* Edwards' Trade-mark – – 454
——— *v.* Dewar. *In re* Andrews – – – – 159
Edwards' Trade-mark, *In re.* Edwards *v.* Dennis – – 454

F.

Fawsitt, *In re.* Galland *v.* Burton – – – – – 231
Forde, *Ex parte.* *In re* Delta Syndicate, Limited – – 153
Foxwell *v.* Lewis. *In re* Lewis 654

G.

PAGE

Galland *v.* Burton. *In re* Fawsitt – – – – – 231
Gandy *v.* Gandy – – – 57
Gladstone, Syer *v.* – – – 614
Gordon *v.* James – – – 249

H.

Harrison, *In re.* Turner *v.* Hellard – – – – – 390
Hastings, Smethurst *v.* – – 490
Haywood *v.* Silber – – – 404
Hellard, Turner *v.* *In re* Harrison – – – – – 390
Hobson, Shillito *v.* *In re* Richardson – – – – 396
Houghton Estate, *In re* – – 102
Hudspith, Vint *v.* – – – 24

I.

Isaac, *In re.* Jacob *v.* Isaac – 418
———, Jacob *v.* *In re* Isaac – 418

J.

Jacob *v.* Isaac. *In re* Isaac – 418
James, Gordon *v.* – – – 249
Jarratt, Crompton *v.* – – 298
Johnson and Tustin, *In re* – 42
Johnstone, Norton *v.* – – 649
——— *v.* Spencer (Earl) – 581

L.

Lacon, Martin *v.* *In re* Christmas – – – – – 544
Lakin, Deakin *v.* *In re* Shakespear – – – – 169
Lamb and Portal, *In re* – – 50
Lee and Chapman's Case. *In re* Asphaltic Wood Pavement Company – – – – 216
Leicester Club and County Racecourse Company, *In re.* *Ex parte* Cannon – – – 629
Leigh, Drummond *v.* *In re* Bryon – – – – 110

PAGE

Levy's Trusts, *In re* – – 119
Lewis, *In re*. Foxwell *v.* Lewis 654
——, Foxwell *v.* *In re* Lewis 654
Lindsell *v.* Phillips. *In re* Powers – – – – 291

M.

McBean *v.* Deane – – – 520
Macreight, *In re*. Paxton *v.* Macreight – – – – 165
——, Paxton *v.* *In re* Macreight – – – – 165
Malcolm, Von Brockdorff *v.* – 172
Manning, *In re* – – – 480
Manton *v.* Tabois – – – 92
Marjoribanks, Marlborough (Duke of) *v.* *In re* Duke of Marlborough's Settlement – 127
Marlborough (Duke of) *v.* Marjoribanks. *In re* Duke of Marlborough's Settlement – 127
Marlborough's (Duke of) Settlement, *In re*. Duke of Marlborough *v.* Marjoribanks – 127
Marseilles Extension Railway and Land Company, *In re*. Smallpage's and Brandon's Cases – – – – 598
Martin *v.* Lacon. *In re* Christmas – – – – – 544
Mellor *v.* Swire. *In re* Swire – 239
Merchant Taylors' Company, *In re* – – – – – 28
Meredith, Westbury-on-Severn Rural Sanitary Authority *v.* – 387
Midland Railway Company *v.* Miles – – – – 634
Miles, Midland Railway Company *v.* – – – – 634
Moody and Yates' Contract, *In re* 344
Munby *v.* Ross. *In re* Coulman 186
Mutual Aid Permanent Benefit Building Society, *In re* – 434

N.

Nelson Son and Hastings, *In re* 1
Newhaven Local Board *v.* Newhaven School Board – – 350
Newhaven School Board, Newhaven Local Board *v.* – – 350
Nicol *v.* Nicol – – – 143
Norton *v.* Compton. *In re* Compton – – – – – 15
——— *v.* Johnstone – – 649
Norwich (Corporation of), Shepherd *v.* – – – – 553
Noyes *v.* Pollock – – – 336

P.

Paget's Settled Estates, *In re* – 161
Paxton *v.* Macreight. *In re* Macreight – – – – 165
Petgrave, Workman *v.* *In re* Wait – – – – 617
Phillips, Lindsell *v.* *In re* Powers 291
Pollock, Noyes *v.* – – – 336
Portal and Lamb, *In re* – – 50
Powers, *In re*. Lindsell *v.* Phillips 291
Preston Corporation, Rawstone *v.* 116

R.

Rawstone *v.* Preston Corporation 116
Revett, Doggett *v.* *In re* Youngs 421
——, Vollum *v.* *In re* Youngs 421
Richardson, *In re*. Shillito *v.* Hobson – – – – 396
——, Robertson *v.* – – 623
Rivett-Carnac's (Sir J.) Will, *In re* – – – – – 136
Roberts, *In re*. Tarleton *v.* Bruton 234
Robertson *v.* Richardson – – 623
Ross, Munby *v.* *In re* Coulman 186
Russell Son & Scott, *In re* – 114

S.

St. Mary Abbotts, Kensington (Vestry of), Teuliere *v.* – 642
Shakespear, *In re*. Deakin *v.* Lakin – – – – 169
Shepherd *v.* Norwich (Corporation of) – – – – 553
Shillito *v.* Hobson. *In re* Richardson – – – – 396
Silber, Haywood *v.* – – 404

PAGE

Smallpage's and Brandon's Cases. *In re* Marseilles Extension Railway and Land Company – 598
Smethurst *v.* Hastings – – 490
Smith, Webb *v.* – – – 192
Spencer, *In re.* Thomas *v.* Spencer – – – – – 183
———- (Earl), Johnstone *v.* – 581
———-, Thomas *v.* *In re* Spencer 183
Stephens, Dyke *v.* – – – 189
Street *v.* Union Bank of Spain and England – – – 156
Stuart *v.* Wrey. *In re* Wrey – 507
Swinburn *v.* Ainslie. *In re* Ainslie – – – – 485
Swire, *In re.* Mellor *v.* Swire – 239
———-, Mellor *v.* *In re* Swire – 239
Syer *v.* Gladstone – – – 614

T.

Tabois, Manton *v.* – – – 92
Tarleton *v.* Bruton. *In re* Roberts – – – – – 234
Teuliere *v.* St. Mary Abbotts, Kensington (Vestry of) – 642
Thomas *v.* Spencer. *In re* Spencer – – – – – 183
Thompson, *In re* – – – 441
Turner *v.* Heliard. *In re* Harrison – – – – – 390
Tustin and Johnson, *In re* – 42

U.

Union Bank of Spain and England, Street *v.* – – – 156

V.

PAGE

Vint *v.* Hudspith – – – 24
Vollum *v.* Revett. *In re* Youngs 421
Von Brockdorff *v.* Malcolm – 172

W.

Wait, *In re.* Workman *v.* Petgrave – – – – 617
Watson, Ashbury *v.* – – 376
Webb *v.* Smith – – – 192
Westbury-on-Severn Rural Sanitary Authority *v.* Meredith – 387
Whetham *v.* Davey – – 574
Whinney, Colonial Bank *v.* – 261
"White Rose" Trade-Mark, *In re* 505
Wilks *v.* Bannister – – – 512
Willoughby (an Infant), *In re* – 324
Workman *v.* Petgrave. *In re* Wait – – – – – 617
Wrey, *In re.* Stuart *v.* Wrey – 507
———, Stuart *v.* *In re* Wrey – 507

Y.

Yates and Moody's Contract, *In re* – – – – – 344
Youngs, *In re.* Doggett *v.* Revett – – – – – 421
———-, *In re.* Vollum *v.* Revett – – – – – 421

TABLE OF CASES CITED.

A.

		PAGE
Agra Bank, Ex parte	Law Rep. 3 Ch. 555	272
Albemarle (Earl of) *v.* Rogers	2 Ves. 477	303
Alchin *v.* Hopkins	1 Bing. N. C. 99	526
Aldrich *v.* Cooper	8 Ves. 382; 2 W. & T. L. C. 5th Ed. p. 80	197
Alexander *v.* Brame	30 Beav. 153	546
Allen *v.* Kemble	6 Moo. P. C. 314	600
Alloway *v.* Steere	10 Q. B. D. 22	219
Ames *v.* Cadogan	12 Ch. D. 868	172
Ancona *v.* Waddell	10 Ch. D. 157	623
Angerstein, Ex parte	Law Rep. 9 Ch. 479	600
Anglesey (Marquis of) *v.* Hatherton (Lord)	10 M. & W. 218	582
Anon.	3 Dyer, 323 b	298
Arab, The	5 Jur. (N.S.) 417	202
Arrowsmith, Ex parte	8 Ch. D. 96	525
Arrowsmith's Trusts, In re	2 D. F. & J. 474	518
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	377
Ashton *v.* Langdale (Lord)	4 De G. & Sm. 402	550
Atkins *v.* Hiccocks	1 Atk. 500	509
Attree *v.* Hawe	9 Ch. D. 337	544
Aylwin's Trusts, In re	Law Rep. 16 Eq. 585	122

B.

Bagley *v.* Mollard	1 Russ. & My. 581	112
Bagot's Settlement, In re	31 L. J. (Ch.) 772	96
Bailey *v.* Lloyd	5 Russ. 330	312
Bainbridge, In re	8 Ch. D. 218	267
Barnett *v.* Blake	2 Dr. & Sm. 117	122
Barry, Ex parte	Law Rep. 17 Eq. 113	267
Barton *v.* Gainer	3 H. & N. 387; 27 L. J. (Ex.) 390	397
Bateman *v.* Hotchkin	10 Beav. 426	651
——— *v.* Ross (Countess of)	1 Dow, 235	144
Batsford *v.* Kebbell	3 Ves. 363	507
Baylis *v.* Attorney-General	2 Atk. 239	391
Baynton *v.* Collins	27 Ch. D. 604	171
Bentley, Ex parte	12 Ch. D. 850	600
Blake *v.* Harvey	29 Ch. D. 827	242
Bonner, In re	19 Ch. D. 201	515

		PAGE.
Booth *v.* Booth	4 Ves. 399	508
Boraston's Case	Tudor L. C. (Real Property) 3rd Ed. p. 809.	508
Boswell *v.* Coaks	27 Ch. D. 424	494
Bown, In re	27 Ch. D. 411	184
Braby & Co.'s Application, In re	21 Ch. D. 223	469
Bradlaugh *v.* De Rin	Law Rep. 3 C. P. 538; Ibid. 5 C. P. 473	600
Brice *v.* Bannister	3 Q. B. D. 569	197
Bridgnorth (Corporation of) *v.* Collins	15 Sim. 541	517
Bright *v.* Durnell	4 Dowl. 756	557
Brooke *v.* Mostyn (Lord)	2 D. J. & S. 373	494
Brown *v.* De Tastet	Jac. 284	577
Brown's Will, In re	27 Ch. D. 179	163
Bruff *v.* Cobbold	Law Rep. 7 Ch. 217	425
Buckeridge *v.* Ingram	2 Ves. 652	546
Buckland *v.* Papillon	Law Rep. 1 Eq. 477; 2 Ch. 67	209
Bullock *v.* Dodds	2 B. & Ald. 258	283
Bunn, In re	16 Ch. D. 47	507
Busk *v.* Aldam	Law Rep. 19 Eq. 16	184
Butler *v.* Butler	5 Ch. D. 554	494
Byron's Charity, In re	23 Ch. D. 171	541

C.

Caldecott *v.* Harrison	9 Sim. 457	517
Cardigan (Earl of) *v.* Armitage	2 B. & C. 197	637
Carr *v.* Living	33 Beav. 474	76
Carthew, In re	27 Ch. D. 485	445
Cartwright, In re	Law Rep. 16 Eq. 469	7
Carven, In re	8 Beav. 436	443
Cassels *v.* Stewart	6 App. Cas. 64	577
Cavander *v.* Bulteel	Law Rep. 9 Ch. 79	577
Cave *v.* Cave	15 Ch. D. 639	251
Cavendish *v.* Cavendish	24 Ch. D. 685; 30 Ch. D. 227	546
Chambers, Re	34 Beav. 177; 5 N. R. 298; 13 W. R. 375	445
Chambers *v.* Smith	3 App. Cas. 795	609
Chapman *v.* Cowlan	13 East, 10	582
Charge *v.* Goodyer	3 Russ. 140	515
Charlesworth *v.* Holt	Law Rep. 9 Ex. 38	144
Chaston, In re	18 Ch. D. 218	516
Clark *v.* Browne	2 Sm. & Giff. 524	92
Clayton's Case	1 Mer. 572	7
Clun's Case	10 Rep. 126 a; Tudor's Leading Cases of Real Property, 284	817
Cockerell *v.* Dickens	3 Moo. P. C. 98; 1 M. D. & D. 45	122
Cockrill *v.* Sparkes	1 H. & C. 699	291
Cole *v.* Scott	1 Mac. & G. 518	51
Colt *v.* Lichfield (Bishop of)	Hob. 140	527
Cooke *v.* Fuller	26 Beav. 99	502
Coppin *v.* Craig	7 Taunt. 243	196
——— *v.* Walker	7 Taunt. 237	196
Coward & Adam's Purchase, In re	Law Rep. 20 Eq. 179	144, 502
Cowx *v.* Foster	1 J. & H. 30	178
Crickmer's Case	Law Rep. 10 Ch. 614	155

		PAGE
Crook *v.* Hill	Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265	112
Crouch *v.* Waller	4 De G. & J. 302	145
Crow *v.* Bank of Ireland	19 W. R. 910	190
Crozier *v.* Crozier	3 D. & W. 353	179
Cudliff *v.* Walters	2 Mood. & Rob. 232	557
Cunningham, Ex parte	13 Q. B. D. 418	166
Cupit *v.* Jackson	13 Price, 721.	87

D.

Danby *v.* Coutts & Co.	29 Ch. D. 500	303
Davidson's Settlement Trusts, In re	Law Rep. 15 Eq. 383	122
Day *v.* Brownrigg	10 Ch. D. 294	157
De Crespigny *v.* De Crespigny	9 Ex. 192	76
De Geer *v.* Stone	22 Ch. D. 243	325
Denn *v.* Spray	1 T. R. 466	582
D'Eyncourt *v.* Gregory	3 Ch. D. 635	140
Dickson *v.* Reuter's Telegraph Company	2 C. P. D. 62	63
Dimoline *v.* Ward	Annual Practice, 1884–5, p. 381	190
Dodgson's Trust, Re	1 Drew. 440	518
Doe *v.* Meyrick	2 C. & J. 223	303
—— *v.* Musgrave	1 Man. & G. 625	525
Dommett *v.* Bedford	3 Ves. 149	122
Donald *v.* Suckling	Law Rep. 1 Q. B. 585	398
Dorin *v.* Dorin	Law Rep. 7 H. L. 568	112
Dorman, Ex parte	Law Rep. 8 Ch. 51	266
Douglas *v.* Douglas	Kay, 400	51
Duke's Case	1 Ch. D. 620	378
Duncuft *v.* Albrecht	12 Sim. 189	283
Dundas *v.* Dutens	1 Ves. 196	283
——— *v.* Wolfe-Murray	1 H. & M. 425	509
Dunston *v.* Imperial Gas Light & Coke Company	3 B. & Ad. 125	631

E.

Edwards, In re	Law Rep. 9 Ch. 97	503
——— *v.* Jones	1 My. & Cr. 226	401
Eley *v.* Positive Government Security Life Assurance Company	1 Ex. D. 88	65
—— *v.* ——	1 Ex. D. 20	631
Ellis *v.* Nimmo	Lloyd & Goold, temp. Sugden, 333	64
Elmslie, In re	Law Rep. 16 Eq. 326	7
Elton *v.* Elton	3 Atk. 504	509
Empress Engineering Company, In re	16 Ch. D. 125	61
Evans *v.* Davis	10 Ch. D. 747	407
——— *v.* Evans	23 Beav. 1	620
Evelyn *v.* Worsfold	15 L. T. (O.S.) 4	582
Everest *v.* Glyn	6 Taunt. 425	582
Ewart *v.* Chubb	Law Rep. 20 Eq. 454	503
Ewer *v.* Hayden	Cro. Eliz. 476, 658	50

F.

		PAGE
Fawcett *v.* Whitehouse	1 Russ. & My. 132	576
Fearnside *v.* Flint	22 Ch. D. 579	291
Fernandes, In re	W. N. 1878, p. 57	114
Ferrao's Case	Law Rep. 9 Ch. 355	600
Ferrer's (Earl) Case	2 Eden, 373	138
Ferrier *v.* Jay	Law Rep. 10 Eq. 550	178
Ffooks *v.* South Western Railway Company	1 Sm. & Giff. 142	379
Field *v.* Megaw	Law Rep. 4 C. P. 660	196
Finch *v.* Squire	10 Ves. 41	549
Fletcher *v.* Fletcher	2 Cox, 99	144
Flower *v.* Lloyd	6 Ch. D. 297	241
Folkestone (Corporation of) *v.* Woodward	Law Rep. 15 Eq. 159	359
Ford & Sheldon's Case	12 Rep. 1	283
Fothergill's Case	Law Rep. 8 Ch. 270	155
Fraser *v.* Mason	10 Q. B. D. 398; 11 Q. B. D. 574	582
Fry *v.* Tapson	28 Ch. D. 268	494
Fulwood's Case	4 Rep. 65 a.	285

G.

Gale *v.* Gale	6 Ch. D. 144	64
Gandy *v.* Gandy	7 P. D. 77, 168	64
Gard *v.* Commissioners of Sewers of the City of London	28 Ch. D. 486	645
Gardner *v.* London, Chatham, & Dover Railway Company	Law Rep. 2 Ch. 201	552
Gathercole *v.* Smith	17 Ch. D. 1	524
General Share and Trust Company *v.* Wetley Brick and Pottery Company	20 Ch. D. 130	241
Gerard's (Lord) Case	Godbolt, p. 265, Case 365	594
Gibbs *v.* Lawrence	7 Jur. (N.S.) 137; 30 L. J. (Ch.) 170	95
Glyn *v.* Hood	1 D. F. & J. 334	576
Godfrey, In re	23 Ch. D. 483	495
Godrigg's Case	19 Edw. 4, 1479	591
Goodwin *v.* Archer	2 P. Wms. 452	419
Gordon, In re	6 Ch. D. 531	654
Gray *v.* Limerick (Earl of)	2 De G. & Sm. 370	302
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	637
Greening *v.* Clark	4 B. & C. 316	268
Grenfell *v.* Windsor (Dean and Canons of)	2 Beav. 544	524
Griffith *v.* Paget	5 Ch. D. 894	379
Grissell's Case	Law Rep. 1 Ch. 528	630
Grogan *v.* Cooke	2 Ball. & B. 230	283
Guinness *v.* Land Corporation of Ireland	22 Ch. D. 349	378
Gully *v.* Exeter (Bishop of)	4 Bing. 290	314
Guthrie *v.* Walrond	22 Ch. D. 573	616
Gwyn *v.* Neath Canal Navigation Company	Law Rep. 3 Ex. 209	312

H.

Hall & Barker, In re	9 Ch. D. 538	7
Hallett's Estate, In re	13 Ch. D. 696	494

		PAGE
Hanson *v.* Graham	6 Ves. 239	508
Harden *v.* Parsons	1 Eden, 145	494
Hargreaves' Trade Mark, In re	11 Ch. D. 669	466
Harrington (Earl of) *v.* Metropolitan Railway Company	13 L. T. (N.S.) 658	566
Harris, In re	15 Ch. D. 561	544
Harrison *v.* Jackson	7 Ch. D. 339	96
——— *v.* Mexican Railway Company	Law Rep. 19 Eq. 358	379
Hart's Trusts, Re	3 De G. & J. 195	508
Hartley's Case	Law Rep. 10 Ch. 157	155
Harvey *v.* Jacob	1 B. & Al. 159	419
Hawkins *v.* Gathercole	6 D. M. & G. 1	524
Hayman, Ex parte	8 Ch. D. 11	267
Hazle's Settled Estates, In re	29 Ch. D. 78	609
Heath *v.* Crealock	Law Rep. 10 Ch. 22	398
Heather, In re	Law Rep. 5 Ch. 694	114, 443
Hepburn *v.* Skirving	4 Jur. (N.S.) 651	52
Higginson *v.* Hall	10 Ch. D. 235	189
Highgate Archway Company *v.* Jeakes	Law Rep. 12 Eq. 9	208
Hill *v.* Wilson	Law Rep. 8 Ch. 888	398
Hindley *v.* Westmeath (Marquis of)	6 B. & C. 200	145
Hirschfeld *v.* Smith	Law Rep. 1 C. P. 340	600
Hobart *v.* Hammond	4 Rep. 27 b.	582
Hogg *v.* Brooks	14 Q. B. D. 475	409
Holmes *v.* Penney	3 K. & J. 90	609
Holroyde, In re	29 W. R. 599	443
Hope *v.* Hope	4 D. M. & G. 328	326
Hopkinson *v.* Lusk	34 Beav. 215	309
Hopton *v.* Dryden	Prec. in Ch. 179; 2 Eq. C. Ab. 450	17
Howard *v.* Shrewsbury (Earl of)	Law Rep. 17 Eq. 378	309
Huggins, Ex parte	21 Ch. D. 85	269
Hughes *v.* Kearney	1 Sch. & Lef. 132	253
Humble *v.* Mitchell	11 Ad. & E. 205	283
Humphries, In re	24 Ch. D. 691	112
Hunt *v.* Hort	3 Bro. C. C. 311	391
Hutton *v.* Scarborough Cliff Hotel Company	2 Dr. & Sm. 514, 521; 4 D. J. & S. 672	378
——— *v.* West Cork Railway Company	23 Ch. D. 654	631
Hyde *v.* Warden	3 Ex. D. 72	407

I.

Ibbetson, Ex parte	8 Ch. D. 519	272
Ince Hall Rolling Mills Company *v.* Douglas Forge Company	8 Q. B. D. 179	219
Ingle *v.* Partridge	34 Beav. 411	494
Insole, In re	Law Rep. 1 Eq. 470	144
Ion *v.* Ashton	28 Beav. 379	546
Irish Land Commission *v.* Grant	10 App. Cas. 14	86

J.

James *v.* Rumsey	11 Ch. D. 398	399
Jarratt *v.* Oldham	39 L. J. (Ch.) 349	303

		PAGE
Jee *v.* Thurlow	2 B. & C. 547	147
Jefferys *v.* Jefferys	Cr. & Ph. 138	64
Jelley, Son & Jones' Application, In re	51 L. J. (Ch.) 639, n.	469
Jenner *v.* Jenner	Law Rep. 1 Eq. 361	309
Jervis *v.* Lawrence	22 Ch. D. 202	544
Jesus College, Cambridge	W. N. 1884, p. 37	541
Johnson and Tustin, In re	30 Ch. D. 42	345
——— *v.* Crook	12 Ch. D. 639	516
——— *v.* Lander	Law Rep. 7 Eq. 228	144, 502
Jones, In re	26 Ch. D. 736	609
——— *v.* Curry	1 Sw. 66	620
——— *v.* Lewis	3 De G. & Sm. 471	495

K.

Kelly *v.* Hutton	Law Rep. 3 Ch. 703	577
Kennedy *v.* Green	3 My. & K. 699	251
Kensey *v.* Langham	Cas. t. Tal. 143	298
King *v.* Lucas	23 Ch. D. 712	170
Kintrea, Ex parte	Law Rep. 5 Ch. 95	600
Knapp *v.* Williams	4 Ves. 430, n.	544
Knatchbull's Settled Estate, In re	29 Ch. D. 588	651
Knight *v.* Criddle	9 East, 48	282

L.

Lamphier *v.* Despard	2 D. & War. 59	95
Lawrie *v.* Lees	7 App. Cas. 19	241
Leake *v.* Robinson	2 Mer. 363	509
Lebel *v.* Tucker	Law Rep. 3 Q. B. 77	599
Leslie's Settlement Trusts, In re	2 Ch. D. 185	107
Lewis, Re	1 Q. B. D. 724	115
Lewis' Case	26 L. T. (N.S.) 673	630
Lewis *v.* Bond	18 Beav. 85	407
Life Association of Scotland *v.* Siddal	3 D. F. & J. 58	494
Lister *v.* Bradley	1 Hare, 10	509
Lloyd *v.* Guibert	Law Rep. 1 Q. B. 115	599
——— *v.* Lloyd	Law Rep. 2 Eq. 722	623
Loane *v.* Casey	2 W. Bl. 965	15
London (Bishop of) *v.* Southwell (Chapter of)	Hob. 303	303
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	209
Love *v.* L'Estrange	5 Bro. P. C. 59	509
Lovell *v.* Knight	3 Sim. 275	620
Lybbe *v.* Hart	29 Ch. D. 8	122

M.

Maddison *v.* Chapman	1 J. & H. 470	619
Maidstone and Ashford Railway Company, Ex parte	25 Ch. D. 168	542
Mansel, In re	33 W. R. 727	535

		PAGE
Mant *v.* Leith	15 Beav. 524	494
Markham, In re	16 Ch. D. 1	424
Masters *v.* Pontypool Local Government Board	9 Ch. D. 677	358
Mayott *v.* Mayott	2 Bro. C. C. 125	515
Meek *v.* Devenish	6 Ch. D. 566	655
Megson *v.* Hindle	15 Ch. D. 198	110
Mersey Steel and Iron Company *v.* Naylor	9 Q. B. D. 648; 9 App. Cas. 434	218
Metropolitan Railway Company *v.* Woodhouse	34 L. J. (Ch.) 297	565
Midland Railway Company *v.* Haunchwood Brick and Tile Company	20 Ch. D. 552	637
Moore *v.* Magrath	1 Cowp. 9	306
——— *v.* Moore	29 Beav. 496	92
Morgan, In re	24 Ch. D. 114	608
——— *v.* Thomas	6 Ch. D. 176	96
Morrice *v.* Bank of England	Cas. t. Tal. 217; 2 Bro. P. C. 465	425
Morris *v.* Morris	Law Rep. 10 Ch. 68	17
Munt *v.* Glynes	20 W. R. 823	502
Murray *v.* Scott	9 App. Cas. 519	437

N.

Nicholson, In re	3 D. F. & J. 93	6
Noel *v.* Noel	4 Drew. 624	620
Norcutt *v.* Dodd	Cr. & P. 100	269
Nordon *v.* Defries	8 Q. B. D. 508	117
Norwich's (Dean and Chapter of) Case	3 Rep. 73 a	526
Nugent *v.* Vetzera	Law Rep. 2 Eq. 704	333

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	378
Ord, In re	12 Ch. D. 22	52
Orton *v.* Cleveland Fire Brick and Pottery Company	3 H. & C. 868	630

P.

Palmer's Application, In re	21 Ch. D. 47	463
——— Trade Mark, In re	24 Ch. D. 504	467
Parker, In re	15 Ch. D. 528; 17 Ch. D. 262	515
——— *v.* Pistor	3 B. & P. 288	577
Parnther *v.* Gaitskell	13 East, 432	252
Patten, In the Goods of	6 Jur. (N.S.) 151	167
Peacock, Ex parte	Law Rep. 8 Ch. 682	25
Pearks *v.* Moseley	5 App. Cas. 714	181
Pearl *v.* Deacon	1 De G. & J. 461	197
Peek *v.* Gurney	Law Rep. 13 Eq. 79; 6 H. L. 377	379
Pender, In re	8 Beav. 299	447
Peters *v.* Lewes and East Grinstead Railway Company	18 Ch. D. 429	566

		PAGE
Philpott *v.* St. George's Hospital	6 H. L. C. 338	548
Phosphate of Lime Company *v.* Green	Law Rep. 7 C. P. 43	379
Pidgely *v.* Pidgely	1 Coll. 255	178
Pike *v.* Fitzgibbon	17 Ch. D. 454	170
Pitts *v.* La Fontaine	6 App. Cas. 482	600
Portland (Duke of) *v.* Bingham	1 Hagg. Cons. 157	526
——— *v.* Hill	Law Rep. 2 Eq. 765	582
Potter's Trust, In re	Law Rep. 8 Eq. 52	236
Prior *v.* Horniblow	8 Y. & C. Ex. 200	428
Pritchard's Case	Law Rep. 8 Ch. 956	155
Pulbrook *v.* Richmond Consolidated Mining Company	9 Ch. D. 610.	630

R.

Randle *v.* Gould	8 E. & B. 457	144
Ranger *v.* Great Western Railway Company	4 De G. & J. 74	190
Raven, Re	45 L. T. (N.S.) 742	114
Redmayne *v.* Forster	Law Rep. 2 Eq. 467	576
Redondo *v.* Chaytor	4 Q. B. D. 453	419
Reg. *v.* Garland	Law Rep. 5 Q. B. 269	582
—— *v.* Great Northern Railway Company	2 Q. B. D. 151	566
Republic of Liberia *v.* Imperial Bank	Law Rep. 16 Eq. 179.	190
Rex *v.* Boughey	1 B. & C. 565	582
—— *v.* Capper	5 Price, 217	283
—— *v.* Helleston	2 Douglas Election Cases, 1	373
—— *v.* Hendon	2 T. R. 484	582
—— *v.* Knollys	1 Ld. Raym. 10	138
—— *v.* Sutton.	1 Wm. Saund. 275, b & c	283
Rice *v.* Rice	2 Drew. 73	253
Richardson, Ex parte	Mont. & Ch. 43	277
Ridley, In re	11 Ch. D. 645	185
Roberts *v.* Kuffin	2 Atk. 112	95
Robinson *v.* Robinson	1 D. M. & G. 247	228, 546
——— *v.* Rutter	4 E. & B. 954	196
Roe *v.* Ireland	11 East, 280.	582
—— *v.* Parker	5 T. R. 26	582
Rooke *v.* Kensington (Lord)	2 K. & J. 753	303
——— *v.* Rooke	2 Dr. & Sm. 38	619
Rothschild *v.* Currie	1 Q. B. 43	606
Rouquette *v.* Overmann	Law Rep. 10 Q. B. 525	600
Roxburghe *v.* Cox	17 Ch. D. 520	196, 218
Rummens *v.* Hare	1 Ex. D. 169.	397
Ryall *v.* Rolle	1 Atk. 165	286
—— *v.* Rowles	1 Ves. Sen. 348	283

S.

St. Nazaire Company, In re	12 Ch. D. 88	241
Samuel *v.* Samuel	12 Ch. D. 152	122
Sanderson *v.* Bayley	4 My. & Cr. 56	515
——— *v.* Bell	2 C. & M. 304	196
Saunders *v.* Vautier	Cr. & Ph. 240	508
Scottish Widows' Fund *v.* Craig	20 Ch. D. 208	86

		PAGE
Sear *v.* House Property and Investment Society	16 Ch. D. 387	407
Searle *v.* Law	15 Sim. 95	399
Shaw *v.* Rowley	16 M. & W. 810	269
Silcox *v.* Bell	1 S. & S. 301	515
Sims *v.* Bruttoń	5 Ex. 802	251
Skerratt *v.* North Staffordshire Railway Company	2 Ph. 475	557
Slade *v.* Fooks	9 Sim. 386	515
Slade's Case	4 Rep. 92 b.	283
Slee *v.* Bradford (Corporation of)	4 Giff. 262	359
Sleeman *v.* Wilson	Law Rep. 13 Eq. 36	427
Société Générale de Paris *v.* Tramways Union Company	14 Q. B. D. 424	267
Sottomaior, In re	Law Rep. 9 Ch. 677	320
Spackman *v.* Evans	Law Rep. 3 H. L. 171	379
Speer's Trusts, In re	3 Ch. D. 262	107
Speight *v.* Gaunt	9 App. Cas. 1	495
Spencer *v.* Wilson	Law Rep. 16 Eq. 501	509
Stafford (Earl of) *v.* Buckley	2 Ves. Sen. 170	141
Stamper, In re	30 Ch. D. 320	322
Stanford *v.* Roberts	26 Ch. D. 155	28
Stevens *v.* Robertson	37 L. J. (Ch.) 499	494
Stewart *v.* Jones	3 De G. & J. 532	235
Stockton and Darlington Railway Company *v.* Brown	9 H. L. C. 246	645
Stoddart *v.* Nelson	6 D. M. & G. 68	517
Stokes *v.* Trumper	2 K. & J. 232	7
Street, In re	Law Rep. 10 Eq. 165	7
Stuart *v.* Bute (Marquis of)	1 Dow, 73; 11 Ves. 657	95
Sutton *v.* Sutton	22 Ch. D. 511	291
Swinbanks, Ex parte	11 Ch. D. 525	249
Swinfen *v.* Swinfen	29 Beav. 207	96

T.

Taverner's Case	4 Rep. 27 a.	582
Taylor *v.* Richardson	2 Drew. 16	391
Teape's Trusts, In re	Law Rep. 16 Eq. 442	178
Tewart *v.* Lawson	Law Rep. 18 Eq. 490	651
Thomas *v.* Daw	Law Rep. 2 Ch. 1	645
——— *v.* Williams	24 Ch. D. 558	535
Thompson *v.* Finch	22 Beav. 316	494
Thornton *v.* Kempson	Kay, 592	550
——— *v.* Thornton	Law Rep. 20 Eq. 599	178
Threlfall *v.* Wilson	8 P. D. 18	420
Timewell *v.* Perkins	2 Atk. 102	95
Tiverton and North Devon Railway Company *v.* Loosemore	9 App. Cas. 480	566
Tomlinson *v.* Gill	1 Amb. 330	65
Touche *v.* Metropolitan Railway Warehousing Company	Law Rep. 6 Ch. 671	58
Townsend *v.* Early	34 Beav. 23	122
Traherne *v.* Gardner	5 E. & B. 913	582
Trimbey *v.* Vignier	1 Bing. N. C. 151	600
Trimmer *v.* Bayne	9 Ves. 209	202
Turner *v.* Turner	1 Bro. C. C. 316	141
Tweddle *v.* Atkinson	1 B. & S. 393	61

U.

		PAGE
Udny *v.* Udny	Law Rep. 1 H. L. (Sc.) 441	167
Union Bank of Manchester, Ex parte	Law Rep. 12 Eq. 354	267
Unsworth *v.* Speakman	4 Ch. D. 620	235
Ustewayt's Case	12 Hen. 7, 1496	591

V.

Vandaleur *v.* Blagrave	6 Beav. 565	252
Viney *v.* Chaplin	2 De G. & J. 468	251
Vize *v.* Stoney	2 D. & Wal. 659; 1 D. & War. 337	507

W.

Waite *v.* Bingley	21 Ch. D. 674	122
Walker *v.* Smalwood	Amb. 676	534
——— *v.* Symonds	3 Sw. 1	494
Walsh *v.* Trevanion	15 Q. B. 733	312
Walters *v.* Walters	18 Ch. D. 182	18
Ward *v.* Lawson	Law Rep. 8 Ch. 65	7
Watkins, Ex parte	Law Rep. 8 Ch. 520	266
Webb *v.* Honnor	1 Jac. & W. 352	620
Webster *v.* Webster	4 D. M. & G. 437	144
Wellesley *v.* Beaufort (Duke of)	2 Russ. 1	330
West *v.* Jones	1 Sim. (N.S.) 205	253
West of England Bank, In re	12 Ch. D. 823	630
Westmeath (Marquis of) *v.* Westmeath (Marchioness of)	1 Dow. & C. 519	144
Westzinthus, In re	5 B. & Ad. 817	197
Wheelwright *v.* Walker	23 Ch. D. 752	535
Whieldon *v.* Whieldon	2 Sw. & Tr. 388	76
Whitcomb *v.* Whiting	1 Sm. L. C. 8th Ed. p. 642	294
Whitcombe, In re	8 Beav. 140	114
White *v.* Chitty	Law Rep. 1 Eq. 372	623
——— *v.* James	26 Beav. 191	87
Whiting *v.* Force	2 Beav. 571	518
Wilkins, In re	18 Ch. D. 634	516
Wilkinson *v.* Duncan	30 Beav. 111	181
Willcock *v.* Terrell	3 Ex. D. 323	527
Williams *v.* Poole	21 W. & R. 252	576
——— *v.* Preston	20 Ch. D. 672	425
Williamson *v.* Williamson	Law Rep. 9 Ch. 729	405
Wilson, In re	29 Ch. D. 790	37
——— *v.* Coxwell	23 Ch. D. 764	15
——— *v.* Mushett	3 B. & Ad. 743	144
Wilton, Re	13 L. J. (Q.B.) 17	8
Windham, In re	4 D. F. & J. 53	323
Wingfield, Ex parte	10 Ch. D. 591	266
Winstone's Case	12 Ch. D. 239	378
Wood *v.* Manley	11 Ad. & E. 34	144

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re NELSON, SON, & HASTINGS.

C. A.

1885

PEARSON, J.

April 22.

C. A.

June 2.

[1884 N. 1295.]

Costs—Taxation—Agency Charges—Country Solicitor and London Agent—Charge for Counsel's Fees not yet paid.

London solicitors acted as agents in *London* for a country solicitor during the years 1877 to 1884 inclusive. The agency was terminated in 1884. During the period of the agency the *London* agents delivered to the country solicitor, generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, and all moneys received by them on his behalf, and was debited with all payments made by them to him or on his behalf, and with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account, but the last, was carried on to the next account. Some of the actions continued during several years, and one of them (*Rhodes* v. *Jenkins*) continued during the whole period of the agency, and was not then concluded. After the close of the agency the country solicitor claimed a taxation of the whole of the bills:—

Held, by *Pearson*, J., that only those bills which had been delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account and thus paid.

Held, by the Court of Appeal, that the bills of costs in *Rhodes* v. *Jenkins* (to which the appeal was limited), notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills could not be treated as one continuous bill at the option of the country solicitor.

The *London* agents had charged the country solicitor with fees to counsel

960

C. A.
1885
In re NELSON, SON, & HASTINGS.

which had not yet been paid, but the country solicitor had not supplied them with sufficient funds to pay the fees:—

Held, by *Pearson*, J., that this charge was not a circumstance sufficient to justify a taxation.

THIS was a summons by Mr. *Charles Norton*, a solicitor at *Swansea*, asking a reference to the Taxing Master to tax and settle the bills of fees, charges, and disbursements delivered during the years 1877, 1878, 1879, 1880, 1881, 1882, 1883, and 1884, to the applicant by Messrs. *Nelson, Son, & Hastings*, his solicitors and *London* agents.

In an affidavit made by *Norton* in support of his application, and filed on the 7th of January, 1885, he said that the late firm of *Nelson, Son, & Hastings*, whose business was from the 10th of November, 1884, carried on by two of the partners in the former firm under the style of *Nelson & Son*, acted as his *London* agents from November, 1875, to August, 1884, and also in an action of *Rhodes* v. *Jenkins* "to the present date," and during that time they conducted a great number of actions and matters for him in all divisions of the High Court, and in conveyancing and other matters. He referred to a document marked A, which was a list of a portion of the bills of costs delivered to him by *Nelson, Son, & Hastings* in respect of matters so conducted by them, shewing the dates of the delivery of the bills respectively, and to the cash accounts delivered to him by them extending over the same period and including the bills of costs mentioned in the exhibit A. The cash accounts referred to were for the years 1877 to 1884 inclusive. Each account shewed, on the one side, all sums received by *Nelson & Co.* from *Norton*, or as his agents, in the various matters in which they had acted for him, and, on the other side, the payments which they had made to him, or on his behalf, in those matters, and the amounts of the bills for agency charges which they claimed against him in the same matter. The charges claimed in each matter were entered in a lump sum, thus: "Dec. 31. *Rhodes* v. *Jenkins*, agency charges to date, £253 17*s.* 5*d.*" A separate bill, with detailed items of the charges, was delivered in each case. The balance at the foot of each account, which in every case was against *Norton*, was carried on to the next account. The last account ended on the 29th of

August, 1884, and it shewed a balance of £617 11*s.* 10*d.* due from *Norton*.

Norton deposed as follows:—"It appears by the said cash accounts, and is the fact, that there has never been any settlement of accounts between us throughout the whole period. Various payments on account have been made by me from time to time, and *Nelson & Co.* have received various moneys on my account, but there has always remained a running unsettled account, and each account shews a balance claimed by *Nelson & Co.* to be due from me to them. In a large number of the matters charged for in their said bills of costs against me the business was of a continuous nature, and, as appears by the said list of bills marked A, the bills of costs in such matters are continued and carried on from time to time through each new bill that was delivered, in some cases extending throughout the whole of the bills from the commencement to the end. In particular, in the action of *Rhodes* v. *Jenkins* (an administration action), which was commenced in 1877, and is still proceeding, their charges are continued throughout the series of bills delivered down to the very last of such bills. In that action I am a defendant in my capacity of trustee, and *Nelson & Co.* appeared on the record as properly concerned for me, and in fact they acted therein as my solicitors down to March, 1884. Their costs of acting for me as a trustee have been taxed in such action down to July, 1881, as between solicitor and client, and considerable sums have been taxed off by the Taxing Master from the charges they had previously made against me in the bills mentioned in the exhibit A, but, nevertheless, they now refuse to make any allowance to me in respect of important items of considerable amount so taxed off, but insist upon the payment by me of the sums which have been actually taken off their charges on taxation between solicitor and client. The remainder of their charges in this matter still have to be taxed in the said action in pursuance of an order already made (1). In the action of *Rhodes* v. *Jenkins* an order has also been made for the taxation of the costs of the parties thereto, as between solicitor and client, in which taxation will be included the bills in that matter charged against me by *Nelson & Co.* I find that, in other

(1) This order was dated 7th of June, 1884.

C. A. 1885 *In re* Nelson, Son, & Hastings.

cases besides that of *Rhodes* v. *Jenkins*, considerable reductions have, upon taxation, been made from *Nelson & Co.'s* charges against me, but in respect of which they nevertheless now refuse to allow me, and insist upon payment of their full charges, although they have been shewn by such taxation to be erroneous and excessive. I claim the right to tax all the bills of costs mentioned in the list marked A, and I claim that the whole of such costs are taxable as (amongst other reasons) forming part of one continuous running account, notwithstanding that portions of the said bills have from time to time been delivered for a period of more than twelve months. In addition to the special reasons before appearing, I also claim the right to tax such bills for the following further reason, viz., that they contain large charges for counsel's fees alleged to have been paid on my account, whereas in fact a portion of such fees, to the amount of £384 or thereabouts, has, as I was informed on the 18th of October last, not been paid, and I believe has not been paid to this day. I also claim to have the various items in the said cash accounts properly vouched and verified."

In answer to this affidavit Mr. *A. M. Nelson*, one of the partners in the firm of *Nelson & Son*, deposed as follows: "The sum of £617 11*s.* 10*d.* is the balance due for bills delivered at the date of the delivery of my said firm's cash account to the Petitioner on the 29th of August, 1884, between the 15th of December, 1882, and the 29th of August, 1884, and only £332 19*s.* 2*d.* of the said amount is due in respect of bills of costs which have been delivered to the Petitioner within twelve months immediately preceding the Petitioner's application for a taxation. During the entire period in which the firm of *Nelson, Son, & Hastings* were the *London* agents of the Petitioner they delivered to him yearly bills, except in some few matters where, as a matter of convenience, this custom was departed from by the delivery of bills on special matters at intermediate periods, and they also delivered to the Petitioner cash accounts (being the cash accounts mentioned in the Petitioner's affidavit) made out upon the principle of debiting the Petitioner with the amounts of the said bills of costs, and with any payments made for him, and crediting him with all sums of money which had in any way been received by the firm of *Nelson*,

Son, & Hastings, and the said items on the credit side of the said accounts have specifically shewn all sums which have been received by the firm of *Nelson, Son, & Hastings*, in respect of costs, whether taxed or otherwise, for or on account of the Petitioner or his clients, with the names of the actions, suits, or other proceedings in which such costs have been received. Each cash account so delivered has shewn the balance due from the Petitioner to the firm of *Nelson, Son, & Hastings* in respect of bills of costs or accounts previously rendered at the date of the said cash account. The said bills of costs all contain the full items and particulars of every charge or entry respectively made therein. So far as I am aware, the Petitioner has never during the whole course of the said agency, nor until the month of October, 1884 (when the Respondents were pressing him for payment of the balance due), objected to, or asked for any explanation of, the principle upon which the said bills of costs and cash accounts respectively have been made out, or the nature or amount of the charges made or contained therein. The last cash account was delivered in August, 1884, and, although my firm had then for eighteen months ceased to be the agents of the Petitioner, save for some pending matters, he allowed four months to pass, and made no remark of dissatisfaction until pressed for payment of the balance due as aforesaid. The Petitioner has from time to time during the said agency directed or allowed the firm of *Nelson, Son, & Hastings* to receive and retain towards payment of the said bills of costs, and of the balances shewn to be due to them by the cash accounts, numerous sums of money received, or to be received, by the firm of *Nelson, Son, & Hastings* for or on account of the Petitioner in respect of matters to which the several bills of costs related, and he has also forwarded sums on account of the balances from time to time shewn to be due by the said cash accounts, and upon the completion of probate matters, as the accounts shew, the bills were sent to him, and he has invariably remitted the amount due thereon in discharge within a few days of the receipt of such bills respectively. By means of the payment of the sums credited in the cash accounts the several bills of costs of my said firm hereinbefore mentioned to have been delivered to the Petitioner have (except as to the said sum of

C. A. 1885 *In re* Nelson, Son, & Hastings.

£617 11*s.* 10*d.*) been paid. As to certain fees remaining unpaid to counsel, the Petitioner is well aware that we have more than once pointed out that to him, that, upon payment of the balance due by him to the Respondents, such fees shall immediately be paid. My said firm did not think that they were called upon to make heavy payments out of pocket to counsel and others when from previous experience they had good reason to believe that they would probably have to wait for months or years before such payments would be reimbursed them by the Petitioner. The Respondents are willing that an order should be made for taxation of such of the said bills of costs as have been delivered to the Petitioner within a year prior to his application."

There was no reply to this affidavit.

The summons was heard before Mr. Justice *Pearson* on the 22nd of April, 1885.

Levett, for *Norton*:—

The bills which it is sought to tax really form only one continuous bill. There has been a taxation in some cases as between the solicitor and the client, and items have been disallowed which the *London* agents claim to be allowed as against *Norton*. It may be that they ought to be allowed as against him, but in order that they should be, the Taxing Master ought to be satisfied that these costs were incurred by *Norton's* express direction. For that purpose there ought to be a taxation. There has never been any final settlement between *Norton* and the *London* agents. In *In re Nicholson* (1) a taxation was allowed of bills of costs extending from 1833 to 1857, though some of them had been delivered for more than twelve months, and the solicitor had in 1853 delivered to the client an account current for twenty years, in which he took credit for a number of bills of costs which he delivered at the same time. If the accounts between a principal and his agent have not been settled, the principal is always entitled to have the accounts taken by the Court. There has never been anything amounting to a settlement of the accounts. The bill of costs relating to a particular matter of business or to an action is but one bill, though it may consist of several parts: *Stokes* v.

(1) 3 D. F. & J. 93.

Trumper (1). That principle applies *à fortiori* as between a country solicitor and his *London* agent: *Morgan* and *Wurtzburg* on Costs (2). Retention of costs by a solicitor before the delivery of a bill is not payment of the bill so as to prevent taxation: *In re Street* (3). In that case, and in *In re Cartwright* (4), a series of bills of costs was treated as one bill. The law as to taxation is the same between a country solicitor and his *London* agent as it is between a client and his solicitor: *Ward* v. *Lawson* (5). No doubt in *In re Hall and Barker* (6), *Jessel*, M.R., expressed a different view with regard to treating a series of bills as one continuous bill. The action of *Rhodes* v. *Jenkins* has been going on throughout the whole period, and the costs in that action have not yet been taxed as between solicitor and client. This alone is a sufficient reason for treating the whole account as open. The Respondents have charged Mr. *Norton* with fees to counsel, which they have not yet paid.

Cozens-Hardy, Q.C., and *R. Wallace*, for the *London* agents:—

Only those bills which have been delivered within twelve months can be taxed. The cash account cannot get rid of the fact that separate bills of the costs were delivered. In *In re Hall and Barker*, *Jessel*, M.R., expressed a decided opinion that there is no implied contract that a solicitor shall not be paid for the work which he does in a particular matter until the whole business is concluded. Here the bills of costs were delivered every year, and no item was objected to until the year 1884. The cash accounts were balanced at the end of each year, and the balance was carried on to the account of the next year. The accounts were plainly settled, and, applying the rule in *Clayton's Case* (7), the bills have been paid. The continuance of the relation of solicitor and client is not of itself a sufficient circumstance to justify a taxation of bills which have been delivered more than twelve months: *In re Elmslie* (8). *Stokes* v. *Trumper* (9) was not a taxation case. As to the other cases

(1) 2 K. & J. 232, 247.
(2) Page 444.
(3) Law Rep. 10 Eq. 165.
(4) Ibid. 16 Eq. 469.
(5) Law Rep. 8 Ch. 65.
(6) 9 Ch. D. 538.
(7) 1 Mer. 572.
(8) Law Rep. 16 Eq. 326.
(9) 2 K. & J. 232.

C. A. 1885 *In re* Nelson, Son, & Hastings.

cited, *In re Street* (1) was explained by *Jessel*, M.R., in *In re Hall and Barker* (2). *In re Cartwright* (3) and *In re Hall and Barker* are in favour of the Respondents. In *In re Nicholson* (4) the circumstances were special, and *Ward* v. *Lawson* (5) has no application.

As to the unpaid counsel's fees, *Norton* has not furnished the *London* agents with sufficient funds to pay them. It is the *London* agents who are liable to counsel, and the non-payment of these fees is no ground for taxation: *Re Wilton* (6).

Levett, in reply.

Pearson, J.:—

This is an application by Mr. *Charles Norton*, a country solicitor, for the taxation of the bills of costs of his *London* agents, Messrs. *Nelson, Son, & Hastings*. The connection between the parties began as long ago as the year 1875, and it came to an end in the year 1884. During this period Messrs. *Nelson & Co.* acted as *London* agents for Mr. *Norton* in various matters which were not connected together, except by the fact that they all came from Mr. *Norton*. The course of dealing between the parties was this. *Nelson & Co.* from time to time, at all events once a year, and sometimes (in order to facilitate his making out his charges against his own clients) oftener, delivered to *Norton* bills of costs in respect of all the business which they had transacted for him and for which they claimed to be paid by him, and they also shortly after the end of December in each year, sent him a cash account, shewing, on the one side, all the moneys which they had during that year received from him or on his behalf, and shewing, on the other side, the manner in which they had applied any of those moneys of which they had made special application, and the amounts of the agency charges which they claimed against him in each matter in which they had acted for him. At the end of each year the account was balanced, so as to shew whether *Nelson & Co.* were indebted to *Norton*, or he to them. As a matter

(1) Law Rep. 10 Eq. 165.
(2) 9 Ch. D. 538, 546.
(3) Law Rep. 16 Eq. 469.
(4) 3 D. F. & J. 93.
(5) Law Rep. 8 Ch. 65.
(6) 13 L. J. (Q.B.) 17.

of fact, in every year the account shewed a balance, larger or smaller, to be due from *Norton* to the *London* agents. The account of each year after the first commenced with the balance which was due from *Norton* on the account of the previous year. Mr. *Norton* claims to have all the bills of costs which were delivered throughout this period taxed. Messrs. *Nelson & Co.* admit that he is entitled to taxation of the bills which have been delivered within twelve months. But, as to all the bills which were delivered more than a year ago, they say that they were settled by *Norton's* treating them as items properly charged against him in the cash accounts, and that he is not now entitled to have them taxed.

Mr. *Levett*, with his usual industry and ability, has argued that there was really one continuous running account between the parties, from the beginning to the end of their connection, and that, inasmuch as the proceedings in the action of *Rhodes* v. *Jenkins* were going on during the whole period, and all the costs of that action have not yet been taxed, that circumstance of itself is enough to keep alive the whole account from 1877 to 1884, whether it relates to *Rhodes* v. *Jenkins* or to other matters. I was very much startled at that proposition. I could not see how bills of costs which related to entirely distinct matters could be kept alive, or rather resuscitated, years after the transactions to which they related had come to an end, merely because a bill relating to another matter, which had had a longer existence, had not yet been settled. I should have been very sorry if I had been obliged to come to that conclusion. The same principle would have applied to bills of costs extending over thirty or even fifty years, and I might have had to order the taxation of a bill of costs when the person who had transacted the business to which it related had been in his grave for years. That would open the door to an amount of unfairness which the Court ought to be very slow to sanction.

What then is the nature of the relation between the parties in this case? The relation of solicitor and client is one thing; that of country solicitor and *London* agent is another. In the latter case the principal in the matter is the country solicitor; he, as between himself and the client, has really the charge of the business. The *London* agent is his agent for transacting in

C. A. 1885

In re Nelson, Son, & Hastings.

Pearson, J.

London the business with which he is intrusted by the country solicitor. The *London* agent looks, not to the client, but to the country solicitor, for the payment of the remuneration to which he is entitled for his services; and, though the *London* agent may under some circumstances be entitled to intercept moneys which are coming to the country solicitor, yet if the client, without notice of any claim by the *London* agent, and without any fraud, has settled with the country solicitor, payment by him to the country solicitor will absolve him from any liability to the *London* agent. The country solicitor may make what terms he pleases with his client as to the time when and the manner in which he is to be paid; the *London* agent cannot interfere with the arrangement; he looks to the country solicitor as the person by whom he is to be paid.

In the present case the *London* agents have in each year, down to the year 1884, delivered to the country solicitor the bills of costs which they claim to be paid by him, and also a cash account. The correctness of the cash accounts has been practically admitted by the country solicitor, by his making payments to the *London* agents on account of the balances which appeared by those accounts to be due from him. It appears to me that it is now too late for the country solicitor, when he has almost in so many words admitted the correctness of the accounts, to come here and endeavour to undo all which has been done. I should be introducing a rule for which I am aware of no authority, if I were to hold that under such circumstances a country solicitor is entitled to a taxation of his *London* agents' bills of costs which have been delivered more than twelve months.

The only other point is the allegation that some fees to counsel for which the *London* agents have charged have not really been paid by them. I think *Re Wilton* (1) covers that objection. But, independently of that, the matter does not stand in the same position as if a solicitor was charging his client with sums which he had not paid and for which the client would remain responsible. The *London* agent, not the country solicitor, is responsible to counsel for his fees. The reason alleged by the *London* agents for their not having paid these fees is, that they

(1) 13 L. J. (Q.B.) 17.

had not been supplied with sufficient funds by *Norton*. I have no doubt that, if he had paid them the money, and they had not paid the fees to counsel, he could maintain an action against them for the money which he had paid them for the purpose. This allegation, therefore, affords no grounds for the taxation of the bills. This application is simply for the taxation of bills which have been delivered more than a year, and which the country solicitor has settled in account with the *London* agents. In the absence of any special circumstances, this cannot be allowed. There will be the common order for the taxation of the bills which have been delivered within twelve months, but Mr. *Norton* must pay the costs of the application.

C. A.
1885
In re NELSON, SON, & HASTINGS.
Pearson, J

W. L. C.

From this decision Mr. *Norton* appealed. The notice of motion of appeal was however limited to a claim for taxation of the bills so far only as they related to the costs of the still unfinished action of *Rhodes* v. *Jenkins*.

C. A.

The appeal was heard on the 2nd of June, 1885.

Levett, for the Appellant, renewed the arguments used in the Court below so far as they were applicable to the costs of the said action, and again cited the cases which had been cited below. The arguments and cases are sufficiently referred to in the judgments.

Cozens-Hardy, Q.C., and *R. Wallace*, for the Respondents, were not called upon.

COTTON, L.J.:—

This is an application made by Mr. *Norton*, a solicitor of *Swansea*, for liberty to tax certain bills of costs, which he calls one bill of costs, which were delivered to him by his *London* agents between 1877 and 1884. Mr. Justice *Pearson* ordered taxation only of the bill delivered to Mr. *Norton* in 1884, on the ground that the other bills had been delivered more than twelve months before the date of his application, and that there were no special circumstances which would justify an order for their taxation after a period of a year.

C. A.
1885
In re Nelson, Son, & Hastings.
Cotton, L.J.

The first point argued on the part of the Appellant is that although these bills were on separate pieces of paper, yet that, as regards the costs in the action of *Rhodes* v. *Jenkins*, to which his claim for taxation is limited on this appeal, they do in fact form only one bill. Is this so? The original application of Mr. *Norton* is strongly against his contention, it shews what Mr. *Norton's* view was, because that application claimed taxation not only of the costs of this one action, but also of various other costs in various other actions which have been long ago settled and disposed of. That wider claim has now been abandoned, but the fact that the claim related not only to the costs of *Rhodes* v. *Jenkins*, which are now under taxation, but of other actions and matters, has a bearing on the question whether we can treat these separate pieces of paper as constituting only one bill of costs.

The question really turns on the *Solicitors Act*, which limits the period of taxation of a bill to twelve months after the delivery of a signed bill unless there are special circumstances which justify an order for taxation after that period.

Can we then treat these separate bills as one bill only? I think it would be wrong so to treat them. The accounts were delivered year by year to Mr. *Norton*, and they were to all appearances distinct bills. It can hardly be, and it was not, in fact, contended, that an action could not have been brought by the *London* agents on each separate bill for money due for the work done up to the date of such bill. But it has been said that the country solicitor has the option if he pleases at any time before payment to elect to treat the separate bills as forming one continuous bill. It would be a strange thing if this could be done, if an option could be given to the country solicitor to treat them as one continuous bill, and thereby, without any special circumstances, to require the taxation of the bills after the expiration of the year limited by the statute. The period which the bills in this case cover is seven years, but the period might well be longer. In considering what is a bill within the meaning of the section, we must treat each of these yearly bills as a separate bill so as to limit the right to tax to the period of twelve months after its delivery.

I do not think that the cases which have been referred to by

Mr. *Levett* carry out the proposition for which he has cited them. The case that at first sight appeared to be most in his favour was the case of *Stokes* v. *Trumper* (1), but on examining it, it turns out to have really no bearing on the point. In that case only one bill was delivered, which included the costs in a certain action, and the point of contest was whether there had not been negligence on the solicitor's part in reference to one matter mentioned in the bill; but it was determined that that did not disentitle the solicitor to claim the costs, except so far as they related to that particular matter.

That case has no real bearing on the present question, and as far as I can see none of the cases cited have any bearing on it with the exception of the case of *In re Hall and Barker* (2), where there is an observation of Sir *G. Jessel* which is against the contention of the Appellant.

Is there anything else to make this one continuous bill? The case of *In re Cartwright* (3) has been referred to, in which Lord *Selborne,* when hearing Rolls cases, treated a letter as making separate bits of paper one continuous account, but there was nothing in the correspondence here to have any such effect.

I ought to refer to the case of *In re Street* (4), which has been relied on by Mr. *Levett.* In that case there were three separate sales, and the bill of costs of the second sale was delivered before the bill of costs of the first sale, and there it was held that the two bills, although delivered as separate bills, must be treated as one bill under the circumstances, and for this reason: at the time when the first bill was delivered it was not a bill for all the work conducted up to that time by the solicitor, it being a bill of costs of the second sale only, excluding the costs of the first sale, which he had no right to exclude.

Then it is said that the relation of principal and agent subsisting between the *London* agent and country solicitor is a special circumstance within the meaning of the said statute. If that be so, then there will be a special circumstance in the case of every bill of costs.

Another special circumstance relied upon was that it was always understood between the parties that the costs of the action

(1) 2 K. & J. 232.
(2) 9 Ch. D. 538.
(3) Law Rep. 16 Eq. 469.
(4) Ibid. 10 Eq. 165.

C. A. 1885 *In re* Nelson, Son, & Hastings. Cotton, L.J.

would be provided for and paid out of the fund in Court. That was so, but I cannot treat that as a special circumstance. It may be that in this particular case our decision will have the somewhat strange result that costs which were disallowed as between the country solicitor and his client upon taxation as between solicitor and client, will be chargeable against the country solicitor himself as between himself and his *London* agents. That, however, cannot affect the present question. What we have to consider is whether under the section of the Act Mr. *Norton* has the right to obtain taxation of a bill delivered more than a year before his application. In my opinion, he has no such right, and the appeal fails.

Lindley, L.J.:—

I am of the same opinion. I think that the view of the facts taken by Mr. Justice *Pearson* was the correct one, viz., that each of the bills was, in point of fact, a distinct bill. Can we then say that it would be right to treat these bills not as what they are, distinct bills, but as forming together one bill? Shall we depart from the substance and adopt a fiction? If we were to accede to the view pressed upon us by Mr. *Levett*, in other words, were to enable the Appellant to treat several separate bills as one bill, we should be landing ourselves in difficulties, many of which I can foresee. I think the true principle is that mentioned by the late Master of the Rolls in *In re Hall and Barker* (1), and it is for those who maintain the contrary view to shew some good grounds. Here, in my opinion, there are none sufficiently or nearly sufficiently strong. The case of *Stokes* v. *Trumper* (2) is not really in point when we come to look at it closely.

As regards the alleged special circumstances, I have nothing to add.

Fry, L.J.:—

I am entirely of the same opinion.

Solicitors for Appellant: *Ellis, Munday, & Bartrum.*
Solicitors for Respondents: *Nelson & Son.*

(1) 9 Ch. D. 538. (2) 2 K. & J. 232.

M. W.

In re COMPTON. NORTON *v.* COMPTON.

C. A. 1885 June 9.

[1882 C. 922.]

Administration—Executor—Right of Retainer—Assets received or paid into Court after Death of Executor—Right of Representatives of Executor—Debt under Covenant—Arbitrary Damages.

An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into Court during his lifetime.

If an executor asserts in his lifetime a right of retainer, but dies without having exercised it, his representatives may exercise that right for the benefit of his estate only as to anything which came into the actual possession or under the actual control of their testator, or which was paid into Court during his lifetime.

Wilson v. *Coxwell* (1), unless restricted in this way, must be treated as overruled.

Claims by an executor for breach of a covenant to assign a policy, and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and may therefore, on the authority of *Loane* v. *Casey* (2), be retained.

THIS was an appeal against an order of Mr. Justice *Pearson*, dated the 19th of May, 1884, whereby he declared that Mrs. *Compton*, formerly widow of the testator *William Compton*, was entitled as executrix of the testator to retain a sum of £1500 due to her in respect of the breach of covenant on the part of the testator to assign a policy for that amount, and also to retain damages in respect of the breach of a covenant to replace certain furniture, and that her executors were entitled to rank as creditors against the estate of *William Compton*, in priority to the other creditors for the sum of £1500 and the amount of such damages, and that if necessary an inquiry should be made what was the amount of such damages.

The testator by his marriage settlement, dated the 18th of June, 1872, assigned certain furniture and policies on his life to trustees to hold upon trust, in the events which happened, for his widow absolutely. He also covenanted by the same indenture that

(1) 23 Ch. D. 764. (2) 2 W. Bl. 965.

C. A. 1885 *In re* COMPTON. NORTON *v.* COMPTON.

he would on the 23rd of August, 1874, assign or procure to be assigned to the trustees another policy on his life for £1500, to be held by them upon similar trusts. The settlement contained a power to sell the furniture, the testator covenanting that he would out of his own moneys replace the furniture sold with other of a like description and like value.

Some articles of furniture were sold in July, 1880, for £356 9*s.* 6*d.*

The testator died on the 19th of December, 1881, without having performed either of his said covenants or made any compensation for their non-performance. By his will he appointed his widow, *J. U. Davison*, and his son the Defendant *William McGrath Compton*, executrix and executors. The widow alone proved the will on the 18th of February, 1882, liberty being reserved to the son to come in and prove. *J. U. Davison* renounced probate.

In March, 1882, the present creditor's action was commenced against the widow for administration of the testator's estate, and the usual decree was made.

Mrs. *Compton* in June, 1882, carried in a claim in the action for £2500, viz., £1500 under the covenant to assign the policy, and £1000 the sum estimated as necessary to replace the furniture. By her affidavit she claimed to be entitled as executrix of the testator to apply all moneys accrued or to accrue and forming part of his estate, in the first place in payment to herself of the amount of her claims in priority to all other claims made or to be made against the estate.

Mrs. *Compton* had in the previous April released the trustees of the settlement from all liability in respect of the breaches of the two covenants. The trustees had themselves on the 3rd of April, made a claim on the estate of the testator in answer to advertisements for creditors in respect of the covenants.

In September, 1882, Mrs. *Compton* died, having appointed *George Francis Parker* and *Jane Couch* her executors, who proved her will on the 12th of November, 1883.

On the 2nd of January, 1883, probate of the will of the testator had been granted to his son, the said Defendant, against whom on the 12th of January the administration action was revived.

On the 27th of January, 1883, an application was made on behalf of the Plaintiffs that the surviving partner of the testator should pay into Court a sum of £875 which was admitted to be due from him to the estate, and an order to that effect was made in February, 1883, and the money was paid in.

A sum of £100 had been paid into Court by Mrs. *Compton* during her lifetime, and these two sums constituted the whole of the testator's estate. The executors of Mrs. *Compton* brought in their claim to be admitted as creditors against the testator's estate for the £2500 which their testatrix had claimed. This claim was opposed by the Defendant, the surviving executor, and being adjourned into Court, His Lordship on the 19th of May, 1884, following his former decision in *Wilson* v. *Coxwell* (1), made the order set out above.

The Defendant *W. M. Compton* appealed.

Cozens-Hardy, Q.C., and *Methold*, for the Appellant:—

An executor's right of retainer is confined to that which comes into his hands or which is paid into Court during his lifetime, which is equivalent to payment to him, and is allowed in favour of the executor of the executor only where the second executor has become the representative of the original testator: *Hopton* v. *Dryden* (2). But in this case the Judge has extended the right to money which never came into the hands or under the control of the executrix during her life, and has enabled her representatives, who do not represent the original testator, to retain that which their testatrix never could have retained. His Lordship in fact followed his former decision in *Wilson* v. *Coxwell*, but that decision must be treated as erroneous and now under review. Then the claims were of such a character that no retainer was permissible. The claims were in fact for unascertained damages, which can only be ascertained by an action. They are in fact arbitrary damages, which, on the authority of *Loane* v. *Casey* (3) cannot be retained. *Morris* v. *Morris* (4), on which the Judge relied, is not inconsistent with that presumption; there was in

(1) 23 Ch. D. 764.
(2) Prec. in Ch. 179; 2 Eq. C. Ab. 450.
(3) 2 W. Bl. 965.
(4) Law Rep. 10 Ch. 68.

C. A. 1885 *In re* COMPTON. NORTON *v.* COMPTON.

that case an actual debt, one that could be barred by the statute, although it could only be recovered through the Court of Equity.

Everitt, Q.C. (*Seward Brice* with him), for the Respondents:—

The executrix claimed in June, 1882, her right of retainer. She then had a right to claim to retain that which was in her hands, and assert her right to retain the proceeds of a debt then due to her as executrix, and soon payable, to meet a debt due to her from the estate. That claim to retain the future assets would bind those assets when they fell in and entitle her representatives to retain them if they fell into possession after her death: *Wilson* v. *Coxwell* (1). That was an effectual assertion of her right of retainer, which would have defeated any creditor's action against her; and that assertion of right is sufficient by itself, even though the money may not be in her hands. The fact that a debt due to the testator's estate is not immediately payable, does not oust the right of retainer. If there be a debt, *debitum in præsenti, solvendum in futuro*, the creditors could, assuming no retainer, decline to wait till it became payable and could require it to be sold or discounted, and in that case the executrix could assign that chose in action and keep the money; again, if an action at law had been brought by the creditors against the executrix and she had pleaded assets £200, and a sum of £600 payable in six months, against which she asserted a claim of £800; judgment would, it is submitted, be given in her favour, and the test must be that she could resist an action by creditors.

[LINDLEY, L.J.—The form of the plea of retainer given in *Chitty's* Pleadings does not warrant the idea that an executor could impound an outstanding asset (2).]

Then it is clear from *Loane* v. *Casey* (3) that the claim under the covenants can be retained.

Method, in reply, cited *Walters* v. *Walters* (4).

(1) 23 Ch. D. 764.
(2) *Chitty's* Precedents of Pleading, 3rd Ed. p. 418.
(3) 2 W. Bl. 965.
(4) 18 Ch. D. 182.

COTTON, L.J. :—

This is an appeal from an order of Mr. Justice *Pearson*, by which he has allowed certain claims against the estate of Mr. *Compton*, the testator in this action, and declared that the personal representatives of the deceased executrix are entitled to stand as creditors against his estate in priority to other creditors in respect of those claims. [His Lordship stated the facts shortly as detailed above, and continued :—] During the widow's life hers was the hand to receive, and she was the person to be sued ; after her death her personal representatives, who were not the representatives of the original testator, were not the persons to receive and get in the testator's assets, nor were they the persons to be sued. Under these circumstances Mr. Justice *Pearson* has not allowed retainer, strictly so called, to the representatives of the widow, but as she asserted her right of retainer during her life, he has given her representatives priority as creditors against her husband's estate. I think that except as regards the sum paid into Court by her during her lifetime, there is no right of priority as there is none of retainer. What is retainer? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgment against the executor could obtain priority, while the executor not being able to sue himself could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands. The word "retainer" speaks for itself. When the personal representative is also a creditor of the estate he may retain out of the assets which he has got in his possession, the amount of the claim for which he cannot sue, and when money has been paid into Court during the life of the executor, the Court does not withdraw from the executor his right in respect of that money. The Court treats that payment into Court as in effect a payment into the executor's own hands. Therefore as to the £100, or whatever the sum was that was paid into Court during the life of the widow, she had a right of retainer, and her representatives are now entitled to have that sum paid to them.

But as to the sum of £875, the whole foundation on which the

C. A. 1885 *In re* COMPTON. NORTON *v.* COMPTON. Cotton, L.J.

doctrine of retainer rests is absolutely gone. That sum was not paid in at a time when the widow was in a position to get in the testator's assets, and when it was paid in her representatives were not in that position, not being representatives of the testator. It appears that Mr. Justice *Pearson* has followed a former decision of his own in *Wilson* v. *Coxwell* (1). There he allowed the executors of a deceased executor, who had asserted but not exercised his right of retainer in his lifetime, although they did not represent the original testator, to retain out of the assets of the original testator then in Court the amount of the claim of their testator. I should think it probable, although it does not appear in the report, that the assets were in fact got in while the original executor was the personal representative, not paid to him personally, but paid into Court during his life, which amounts to the same thing. If that is not so, it is a decision which we are able to review, and one which we cannot follow. In my opinion it is an extension of, or rather the establishment of a new doctrine in the place of retainer to say, that when an executor has not got in assets during his life, his personal representatives, not being representatives of the original testator, are entitled to retain assets which never came into the hands or under the control of the original executor.

Then it is said that the widow's claim is of such a character that the doctrine of retainer does not apply. It is said that her executors can claim only by way of damages, against which there is no right of retainer; and the case of *Loane* v. *Casey* (2) was referred to in support of that contention. But I think that decision is against that contention. What *Blackstone* says there is this: "Debts of a higher nature, subsisting and undischarged, must be pleaded by the executor; debts discharged may be given in evidence to shew that the assets are exhausted. This is the discharge of a debt. It is equivalent to a recovery on an action of covenant. For the executrix cannot sue herself." The debt in respect of which the right of retainer in that action was claimed arose under a covenant by the testator with a trustee previous to his marriage, in the event of his death in the lifetime of his wife without issue, to leave to her all his personal estate

(1) 23 Ch. D. 764. (2) 2 W. Bl. 965, 968.

and £200 annuity for her life out of his real estates; or in case of leaving issue a moiety of his personal estate and £100 annuity for her life. It was contended that this covenant did not create a specifically ascertained debt, but only a claim which sounded in damages, and that therefore no retainer was allowed. That was met by *Blackstone* thus: "Damages, that are in their nature arbitrary, cannot be retained; because, till judgment, no man can foretell their amount. Such are damages founded upon torts. But where damages arise from the breach of a pecuniary contract, there is a certain measure for them; and such damages may well be retained. The remedy for a note of hand carrying interest is only in damages, but will any one say this shall not be retained? The jury here have ascertained the damages sufficiently, by finding, that the arrears of the annuity already accrued are more than the value of both the real and personal assets."

So, in my opinion, the claim for breach of the covenant to assign the policy is, within *Loane* v. *Casey* (1), a claim for damages for breach of a pecuniary contract for which there is a certain standard or measure. The same remark applies to the furniture, because the damages would be fixed by the value of the furniture to be replaced. But it is not necessary for the present purpose to go beyond the £1500, because the only right of retainer established is as respects the small sum paid into Court during the life of the executrix. As regards that sum she had the right of retainer, and her executors are entitled to that sum in priority.

LINDLEY, L.J.:—

I am of the same opinion. I will first consider how the case would stand if Mrs. *Compton* were alive. It is said that there is no right of retainer here in respect of her claims, because they were for unliquidated damages and were not debts. I felt some hesitation on this point during the course of the argument. But when we come to see what was done in *Loane* v. *Casey* that decision covers the whole ground. The damages here are not arbitrary either in the case of the covenant to assign the policy or to replace the furniture. The damages under the former covenant are to be assessed on the principle of their amounting to £1500, neither more nor less. There is no other measure of damages, and

(1) 2 W. Bl. 965.

C. A. 1885 *In re* COMPTON. NORTON *v.* COMPTON. Lindley, L.J.

under the latter covenant the damages can be fixed by a certain measure—the value of the furniture to be replaced. If so, *Loane* v. *Casey* (1) covers it. The covenant in that case which gave rise to the debt was a covenant to be performed by the testator to leave on his death either the whole or a moiety of his personal estate and an annuity to his wife. There could be no breach of that covenant till he died. So here the covenants were to assign the policy and to replace the furniture on a certain day and a certain event, so there could be no breach of either covenant until that day arrived and that event happened. If, then, Mrs. *Compton* were now alive she would be entitled to retain to meet both these claims, for it is admitted that one of several executors can retain as against creditors though not as against his co-executor.

But she is dead, and it is said that her legal personal representatives have the same right as she had, at all events, inasmuch as she had in her lifetime asserted her right of retainer, and Mr. Justice *Pearson* has so decided. I cannot follow that decision. The executrix was not the surviving representative, nor are her representatives the representatives of the original testator. They are persons who are in a position to sue that testator's present personal representatives, and the doctrine on which an executor's right to retain is based falls to the ground.

The old law is laid down in *Hopton* v. *Dryden* (2), and that has always been followed without controversy or dispute until we come to the case of *Wilson* v. *Coxwell* (3). It may be that that case is open to the construction put upon it by Lord Justice *Cotton;* but I cannot say that that is clear, and as far as appears from the case as reported I think the decision is wrong.

It therefore comes to this, that the right of Mrs. *Compton's* executors to retain cannot be carried beyond the amount paid into Court during her lifetime, and therefore the decision of Mr. Justice *Pearson*, except as to the £100, cannot be supported.

FRY, L.J.:—

I am of the same opinion. With regard to the sum paid into Court during the widow's lifetime, I think that it is shewn by her affidavit that she did sufficiently during her lifetime assert her

(1) 2 W. Bl. 965.
(2) Prec. in Ch. 179; 2 Eq. C. Ab. 450.
(3) 23 Ch. D. 764.

claim to retain that sum, and *Loane* v. *Casey* (1) governs this case so far as relates to the objection raised that the money claimed by the widow was in the nature of damages; that case determining that when damages are in their nature capable of being made an ascertained and fixed sum with certainty, those damages can be retained. On the other branch of the case I cannot agree with Mr. Justice *Pearson*. The order under appeal assumes that whenever a right of retainer exists in a deceased person the legal personal representatives of that person have as incident to that right of retainer priority over other creditors. I cannot see the logic of that proposition. I cannot see that any priority is allowed to the legal personal representatives as incident to a right of retainer in the person whom they represent. It appears to me that the widow had the right of retainer only as regards the £100. If she had exercised that right of retainer no declaration of priority in her executors was necessary or admissible. The right of retainer in this case cannot apply to the legal personal representatives of the widow, seeing that they are not the legal personal representatives of the testator, for two reasons: first, because the legal personal representatives of the widow had no right to receive the assets of the testator, and if they had no right to receive, they could have none to retain—the right being for the executor to retain what he receives, but when he may not receive the ground for retainer is cut away—; and, secondly, because the right is based on the fact that the executor cannot sue himself. When the legal personal representative of the testator is one person, and the legal personal representative of his executor is another, the case does not arise, because the legal personal representative of the executor can sue the legal personal representative of the original testator. The union of the two characters in one and the same person does not arise.

The order of Mr. Justice *Pearson* must be discharged.

Solicitors: *Carr & Son; Parker & Ponsford.*

(1) 2 W. Bl. 965.

M. W.

C. A.
1885
June 19.

VINT *v.* HUDSPITH.

[1880 V. 47.]

Practice—Action by Executrix and her Husband—Bankruptcy of Husband—Dismissal of Action with Costs—Liability of Husband for the Costs—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

A *feme coverte* sued as executrix, and (the action being brought before the *Married Women's Property Act*, 1882, came into operation) her husband was joined as co-Plaintiff. After the action was set down, but before trial, the husband filed a liquidation petition, and obtained his discharge thereunder. When the action came on for trial the Plaintiffs did not appear, and the action was dismissed with costs:—

Held (affirming the judgment of *Pollock*, B., for *Pearson*, J.), that the husband, who had no beneficial interest which could pass to the trustee under his liquidation, having allowed the action (which was a continuing action after his liquidation) to come on for trial, was liable for the costs.

Semble, per *Lindley*, L.J.:—A possibility of having to pay costs is not a debt provable in bankruptcy, though it may in some cases be a "contingent liability."

JOHN LEONARD HUDSPITH died in 1878, leaving his widow, *Margaret Hudspith*, his universal legatee and sole executrix. *Margaret Hudspith* afterwards married *Mark Vint*, and, on the 26th of April, 1880, she, suing as executrix of *J. L. Hudspith*, brought this action, her husband, *Mark Vint*, being joined as a co-Plaintiff, against *H. Hudspith* and *W. Dodds* in order to establish the right of her former husband, *J. L. Hudspith*, to share in the profits of a certain quarry which she alleged formed part of the property of a partnership formerly carried on between the Defendants and *J. L. Hudspith;* and the Plaintiffs claimed accounts of the partnership and payment, or in the alternative a proper allowance for the services of *J. L. Hudspith* in connection with the quarry.

The action was set down for trial on the 16th of May, 1881, but the pleadings were amended, and by consent the trial was postponed till the Easter Sittings in 1882.

On the 13th of April, 1882, the Plaintiff *Mark Vint* filed a petition for liquidation by arrangement under the *Bankruptcy Act*, 1869, and on the 1st of May, at the first meeting of his creditors, resolutions were passed in favour of liquidation, appointing a

trustee, and granting the debtor his discharge. On the 2nd of May the discharge was certified by the Court, and on the 27th of May the liquidation was closed.

The action came on for trial before Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson*, on the 27th of April, 1883, and, as the Plaintiffs did not appear, judgment was delivered for the Defendants, with costs.

Margaret Vint died in January, 1884, and *Mark Vint* appealed from the judgment of Mr. Baron *Pollock* upon the ground that he knew nothing about the trial of the action, having, as he alleged, given his solicitors instructions prior to his liquidation to abandon it. On the appeal coming on for hearing on the 27th of February, 1885, the Lords Justices held (1) that the Plaintiff's proper course was to apply to the Judge to rehear the case on the ground that the Plaintiff was absent *per incuriam*, and they directed the further hearing of the appeal to stand over until such application had been made. The Plaintiff *Mark Vint* accordingly applied to Mr. Baron *Pollock* to rehear the action, and on the 8th of June, 1885, his Lordship dismissed the motion with costs.

Mark Vint's appeal now came on for further hearing.

J. L. Walton (with him *Pollard*), in support of the appeal :—

The discharge obtained by *Mark Vint* in his liquidation relieved him from all liability which he was under in respect of the costs of this action. Such liability was provable under the *Bankruptcy Act*, 1869, sect. 31, as a present liability. The object of the *Bankruptcy Act*, 1869, was to free the debtor from every kind of liability ; and the words of the 31st section are of the widest possible character, extending to every debt or liability, present or future, certain or contingent, to which the bankrupt is subject at the adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred prior to adjudication.

It has been held that a claim for costs is a debt provable under the 31st section, although the costs had not been taxed at the date of the adjudication : *Ex parte Peacock* (2).

(1) 29 Ch. D. 322. (2) Law Rep. 8 Ch. 682.

C. A. 1885 VINT v. HUDSPITH.

The estimated liability in respect of these costs could have been proved for. Otherwise there would be a liability from which the Act provides no means of exonerating the bankrupt. If this liability is not covered by the discharge no execution could take place upon the judgment.

[LINDLEY, L.J.:—The husband's trustee in bankruptcy could not have been substituted for *Mark Vint* as Plaintiff.]

The position of the husband of an executrix was, before the *Married Women's Property Act*, 1882, analogous to that of a next friend.

[FRY, L.J.:—A next friend is solely liable for the costs of the action. Can there be any obligation to pay costs while the action is pending and before any order for payment of them has been made?]

There can be, and is, a contingent liability. The proper course for the Defendants to have adopted was to have taken proceedings to revive the action: *Robson* on Bankruptcy (1).

Creed, for the Defendants, was not called upon.

COTTON, L.J.:—

This is an action brought by *Mark Vint* and by *Margaret* his wife, as the executrix of her former husband, *J. L. Hudspith*, against the Defendants, with whom *J. L. Hudspith* is alleged to have been formerly in partnership, in order to establish the right of his estate to a share in the partnership assets. The action was brought before the passing of the *Married Women's Property Act*, 1882, under the 18th section of which Act a married woman who is an executrix can sue without her husband, so in this action she and her husband sued as co-Plaintiffs. Judgment was delivered in the action dismissing it with costs on the 27th of April, 1883, and in the interval the Plaintiff *Mark Vint*, the husband, had become bankrupt. He had no beneficial interest or right whatever in the action which could pass to his trustee in bankruptcy. But instead of authorizing a stop to be put to the action, he allowed it to stand for hearing, knowing that unless he did something

(1) 5th Ed. pp. 280, 281.

the action would come on for trial. The action then came on for trial. It was a continuing action after his bankruptcy, which had not become defective by reason thereof. In my opinion, under the circumstances, as *Mark Vint* allowed the action to go on, the order of Mr. Baron *Pollock* dismissing the action with costs was a proper order. The appeal fails, and the costs will be recovered out of any property of *Mark Vint's* which did not pass to his trustee in bankruptcy.

LINDLEY, L.J.:—

I am of the same opinion. I doubt very much whether a possibility of having to pay costs is a provable debt. It may in some cases be a "contingent liability." It is impossible to say that this judgment was not right. The Plaintiff *Mark Vint* has never ceased to be Plaintiff, and the case shews the misfortune of marrying an executrix. The appeal must be dismissed with costs.

FRY, L.J., concurred.

Solicitors for the Appellant: *J. E. & H. Scott*, agents for *R. Brown, Newcastle-on-Tyne.*

Solicitors for the Defendants: *Nash & Field*, agents for *Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne.*

W. W. K.

C. A.

1885

June 2, 17, 20.

In re MERCHANT TAYLORS' COMPANY.

Reinvestment under Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18) [*Revised Ed. Statutes, vol. ix., p.* 628]—*Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order of August*, 1882, *rule* 2, *Schedule I., Part I., rule* 11.

Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the Court. The solicitor of the corporation charged the *ad valorem* scale fee prescribed by the rules under the *Solicitors' Remuneration Act*, 1881, Schedule I., Part I., "for investigating title and preparing and completing conveyance":—

Held (affirming the decision of *Chitty*, J.), that the exception in Schedule I., Part I., rule 11, which provides that the scale shall not apply in case of sales under the *Lands Clauses Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser, was not applicable to the case.

Held, also (approving the decision of *Kay*, J., in *Stanford* v. *Roberts* (1)), that the words of rule 2, "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master," apply only to the "other business" mentioned immediately before, *i.e.*, to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the Court.

Held, also, that as the purchaser's solicitor had had to do all the things which he would have had to do in a purchase not under the direction of the Court, the case was not taken out of the scale by the fact that, in a purchase under the direction of the Court, he did not incur as much responsibility as in a private purchase:—

Held, therefore, that the scale fee was properly chargeable.

THIS case came before the Court of Appeal from a decision of Mr. Justice *Chitty* (2).

Lands belonging to the *Merchant Taylors' Company* had been taken partly by the *Great Eastern Railway Company* and other railway companies, and partly by the Metropolitan Board of Works, under their statutory powers, and the purchase-moneys had been paid into Court. These moneys were reinvested under the direction of the Court in the purchase of an estate, the title to which was investigated in Chambers in the ordinary way. The solicitor of the *Merchant Taylors' Company* made out his

(1) 26 Ch. D. 155. (2) 29 Ch. D. 209.

C. A. 1885 *In re* MERCHANT TAYLORS' COMPANY.

bill of costs relating to this purchase, on the footing of the scale in the order made under the *Solicitors' Remuneration Act*, 1881, Schedule I., Part I., charging the *ad valorem* amount there prescribed for investigating the title and preparing and completing the conveyance. The railway companies objected to this charge, contending that the case was within the exception in the latter part of the 11th rule to Schedule I., Part I: "In cases of sales under the *Lands Clauses Consolidation Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." The Taxing Master allowed the charge. The railway companies took out a summons to review his taxation. Mr. Justice *Chitty* agreed with the Taxing Master and dismissed the summons. The railway companies appealed.

The Metropolitan Board also presented a similar appeal.

June 2. *W. Pearson*, Q.C., and *F. Pownall*, for the Metropolitan Board of Works, and *Macnaghten*, Q.C., and *Smart*, for the Railway Companies:—

We contend that the rules under the *Solicitors' Remuneration Act* do not apply to this particular business. The 11th of the rules in Schedule I., says that the scale shall not apply to cases of sales under the *Lands Clauses Consolidation Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser.

[COTTON, L.J.:—Nothing is said there about purchases.]

We submit that in carrying out the 80th section of the *Lands Clauses Act* there must be the same scale of costs throughout the transaction, including the reinvestment in land. The 80th section of the *Lands Clauses Act* puts all the costs together, those relating to the purchase of land by the company, and those relating to its reinvestment, and in taxation under sect. 83 a distinction cannot be drawn between one transaction covered by sect. 80 and another. The word "sales" in rule 11 carries with it everything that follows from the sale, and the reinvestment is a result of the sale. Another view is this: A purchase from a person who can convey only by virtue of the *Lands Clauses Act*

C. A. 1885

In re MERCHANT TAYLORS' COMPANY.

is not a purchase for money, it is a purchase for money which is to be treated as land, and is only temporarily invested in consols. Until it has been reinvested in land, the sale is not complete. It is in fact an exchange. Then we say that rule 2 of the Order excludes this business, as it was transacted in Chambers. The words "not being business transacted in any Court, &c.," must apply to the whole of what goes before, otherwise they have no sense, as the Order does not provide for anything but conveyancing business. *Stanford* v. *Roberts* (1) cannot, we submit, be sustained, neither can it be sustained on another ground, the solicitor here did not investigate the title within the meaning of the scale, it was investigated by the Chief Clerk.

Romer, Q.C., and *Hood*, for the *Merchant Taylors' Company* :—

The argument for the Appellants comes to this, that in rule 11 instead of "sales" we are to read "purchases or sales."

[COTTON, L.J. :—There is another question, whether the solicitor has done the business for which by rule 2 remuneration according to the scale is provided. As the investigation of title was in Chambers, did he within the meaning of rule 2 investigate the title ?]

He investigates the title in the same way as he does in any other case in which the abstract is sent to counsel. He goes through exactly the same process in the one case as in the other, with this exception, that in a purchase in Court he has to go before the Court, and do things which he would not have to do on an ordinary sale.

[FRY, L.J. :—Take this entry : "Writing Messrs. *Pilgrim* requesting them to produce to the Chief Clerk" a certain document. In an ordinary sale the solicitor would have the responsibility of seeing whether it was duly executed. In the present case the Chief Clerk would see to it. Then, again, there is an entry as to attending the Chief Clerk to approve the conveyance. In a sale out of Court the solicitor would do that himself.]

No doubt the solicitor's responsibility is to some extent

(1) 26 Ch. D. 155.

lessened, but he has just the same amount of trouble. The Chief Clerk does not take the business out of his hands.

[COTTON, L.J. :—The object of the rules was only to deal with the remuneration for conveyancing business. What, then, was the object of the words "not being business in any action or transacted in any Court, &c.," unless it was meant to exclude conveyancing business done in Court or in Chambers ?]

The objection that the solicitor had not investigated the title within the meaning of the rules, was not taken in the objections, and cannot now be raised.

THE COURT thought that it would be the fairest course, that the objections should be amended, so as distinctly to raise this point, and leave was given so to amend, and take the opinion of the Taxing Master, after which the case was to come back direct to the Court of Appeal.

The objections were accordingly amended by adding the following objection to the allowance of the scale fee.

"(A 2.) Because the conduct of the inquiry directed by the above-mentioned order whether a good title could be made to the lands therein mentioned, was not an investigation of title within the meaning of Sched. I. to the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881."

The Taxing Master disallowed the objection, and gave the following reasons :—

"(A 2.) It was decided by Mr. Justice *Kay* in *Stanford* v. *Roberts* (1), that the scale of charges in Sched. I., Part I., to the Order referred to in the amended objection, applies to conveyancing business transacted in an action, and Mr. Justice *Pearson*, in *Fleming* v. *Hardcastle* (9th May, 1885), expressed his concurrence in the decision of Mr. Justice *Kay*.

"It has, ever since the Solicitors' Remuneration Order came into operation, been the invariable practice in the Taxing Master's office to apply 'the scale' to all sales and purchases made by the direction or with the approval of the Court, and to allow, in addition to 'the scale fees,' the fees prescribed by the Rules of

(1) 26 Ch. D. 155.

C. A. 1885

In re MERCHANT TAYLORS' COMPANY.

the Supreme Court, 1883, for the extra work occasioned by the intervention of the Court.

"The course of the business (*i.e.*, the work done by the solicitor) *for which the scale fee is allowed*, is precisely the same whether or not the sale or purchase is carried out under the direction of the Court, except that, when the approval of the Court is necessary, the conveyancing counsel employed is selected by the Court instead of by the solicitor.

"In both cases the vendor's solicitor draws the contract, draws the abstract of title, produces the deeds for examination with the abstract, answers the requisitions on title, peruses the conveyance, hands over the conveyance and title deeds on completion, and makes and carries on (on the part of the vendor) all the attendances and correspondence arising out of the sale.

"And the purchaser's solicitor peruses the abstract and examines it with the deeds, prepares the requisitions grounded on the opinion of the conveyancing counsel on the title, draws and engrosses the conveyance, makes the searches for judgments, &c., receives the conveyance and the title deeds on completion, and makes and carries on (on the part of the purchaser) all the attendances and correspondence arising out of the purchase.

"All the foregoing business is covered by the 'scale fee,' whether the sale or purchase takes place 'in Court' or 'out of Court.'

"The additional work created by the intervention of the Court consists of the preparation of two or three affidavits and of a Chief Clerk's certificate, a few attendances on the Chief Clerk, the drawing up of one or more orders, and (in case of a sale) of an advertisement in the *London Gazette*. For this extra work, the fees prescribed by the Rules of the Supreme Court, 1883, are allowed. I cannot see any reason why the intervention of the Court should operate to deprive a vendor or purchaser of the great benefit which results from the application of 'the scale;' and 'the scale' applying (*Stanford* v. *Roberts* (1) and *Fleming* v. *Hardcastle*) to sales and purchases effected in the course of an administration action or other similar proceeding, I am unable to draw a distinction between the ordinary case, and a case in which, as in the

(1) 26 Ch. D. 155.

present, the purchase sanctioned by the Court has to be completed out of a fund paid into Court under the *Lands Clauses Consolidation Act.*

"It is to be observed that should the decision in *Stanford* v. *Roberts* (1) be overruled, the scale will cease to be applicable to leases of property under administration by the Court, so that, whenever a lease is granted with the approval of the Court, the costs will, instead of being a gross sum easily ascertainable in advance (a matter of no small moment to the lessee, upon whom the costs generally fall), consist of a series of charges in detail increased by the operation of the 2nd Schedule to the Remuneration Order. The result will be that the cost of a lease granted by the Court will, in the majority of cases, greatly exceed the cost of a lease of property of the same rental value not administered by the Court, the work done (exclusive of the attendances on the Chief Clerk, and the preparation of affidavits, certificates, &c., the costs of which are costs in the action, and not paid by the lessee) being the same in both cases."

June 17. *F. Pownall,* for the Metropolitan Board of Works:—

The Taxing Master has gone on *Stanford* v. *Roberts.* We say that, assuming that case to be correctly decided, it does not govern the present. We say that the mere conduct by the solicitor of an inquiry in Chambers as to title is not an investigation of the title within the meaning of the schedule. The mechanical part of the business done is no doubt the same, whether the purchase be conducted in Chambers or without the intervention of the Court, but the responsibility of the solicitor is quite different in the two cases. First of all, the scale fee includes the perusal and completion of the contract. A purchaser's solicitor conducting a purchase out of Court, has to consider whether he will assent to the terms of the contract, having regard to special provisions as to commencement of title, or any other matter, and he must decide on his own responsibility. In the case of a purchase under the direction of the Court, he is freed from responsibility. The Court decides the question for him. No doubt, in a purchase out of Court, the solicitor frequently consults

(1) 26 Ch. D. 155.

C. A. 1885 *In re* MERCHANT TAYLORS' COMPANY.

counsel, but he often has to advise his client whether requisitions suggested by counsel should be insisted upon, and he may have to assume a serious amount of responsibility. In a purchase in Court he is bound by the directions of the Chief Clerk, who acts according to the advice of the conveyancing counsel of the Court. Then, as to the observations at the end of the Taxing Master's answer, if *Stanford* v. *Roberts* (1) is overruled it must be on the ground that the Act and Orders do not apply to conveyancing business transacted in Chambers, and Sched. II. cannot apply any more than Sched. I., so that the solicitor and client are thrown back upon the scale of charges existing before the Act, not upon that scale as modified by Sched. II. We say then: (1), that the matter is not within the order at all, being business transacted in Chambers; (2), that if it is, there is no item which applies to it, for that this is not an investigation of title by the solicitor; and (3), that "sale under the *Lands Clauses Act*" includes everything up to and inclusive of the reinvestment in land.

Romer, Q.C., and *Hood*, for the Respondents:—

As to the question whether the 11th of the rules in Sched. I. excludes the transaction, we say that there are two conclusive answers to the Appellant's case: (1) that this is not a sale; and (2) it is not a case where the vendor's charges are paid by the purchaser. Then, as to the objection that this is business in Chambers, that depends on the question of construction whether the words "not being business in any action," &c. apply only to the last antecedent "other business," or to the whole of what goes before. The natural grammatical meaning of the words is to apply them only to the last antecedent, the second "in respect of" breaking up the matter into two branches; and there is no reason for departing from the natural construction. The solicitor does the same work in the two cases.

[FRY, L.J.:—Surely the responsibility is very different. In a purchase under the Court the solicitor refers all his difficulties to the Chief Clerk.]

There is practically very little difference between his responsi-

(1) 26 Ch. D. 155.

bility in a purchase under the Court and a purchase out of Court where he instructs counsel. *Stanford* v. *Roberts* (1) is a decision in our favour, and Mr. Justice *Pearson* has expressed his agreement with it.

Pownall, in reply:—

The observations of the Taxing Master in *Stanford* v. *Roberts* forcibly put our case, and Mr. Justice *Kay* arrived at his conclusions with great doubt. Sect. 4 of the Act expressly refers to responsibility as an element to be taken into account.

June 20. COTTON, L.J.:—

This is an appeal from the refusal of Mr. Justice *Chitty* to review the Taxing Master's certificate.

The costs were taxed under these circumstances. Money was paid into Court under the *Lands Clauses Consolidation Act* by several companies for land taken in pursuance of that Act, and it was to be reinvested. The bill of costs of the solicitor of the landowner relating to the reinvestment was objected to by the railway companies, on the ground that it contained as its first item a percentage charge on the amount of the money to be reinvested, which is admitted to be the proper charge if the case comes within the rules made under the *Solicitors' Remuneration Act*, 1881, and Sched. I. thereto, being the charge provided by Sched. I. as payable to a purchaser's solicitor "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract if any)."

Three grounds of objection were taken. One was, that having regard to rule 11 in Sched. I., Part I., the schedule did not apply to a case like this, because that rule provides that "In case of sales under the *Lands Clauses Consolidation Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." It was said that that exception ought to be held to apply to the present case, on the ground that although this is the reinvestment of money, yet really it is part of what is referred to by the rule as a sale

(1) 26 Ch. D. 155.

C. A. 1885

In re MERCHANT TAYLORS' COMPANY.

Cotton, L.J.

under the *Lands Clauses Consolidation Act*, since the sale under the Act involved the reinvestment in land, and therefore reinvestment ought to be considered as included in the words "in cases of sales under the *Lands Clauses Consolidation Act*." In my opinion that argument cannot prevail. The terms are distinct. "In cases of sales under the *Lands Clauses Consolidation Act*, or any other private or public Act, under which the vendor's charges are paid by the purchaser." That is not the case here. The vendors' charges are not paid by the purchaser. What we are dealing with is, no doubt, a consequence of the sale. But if it had been intended to include not only the costs on sales, but also the costs on reinvestments, it would have been so stated in the rules.

The next ground of objection was, that transactions like this were excluded from the scale by rule 2; which says that "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, is to be regulated as follows"; and then it says what the remuneration is to be. It was said that in this case the words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master" apply not only to the words "other business," but to the entirety of the matters dealt with in this second rule. There is, no doubt, a little obscurity in this rule, and I think the difficulty has arisen in this way, that although the remuneration and charges provided for by the schedule are simply for what may be called conveyancing business, the rules have adopted nearly all the words of sect. 2 of the Act which enables rules to be made and a scale to be fixed, not only for such business as is provided for by the rules which have been made, but for other business "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business." Under the Act I think it clear that what was meant was business other than conveyancing business, not being business in Chambers or other contentious business, and that the words, "not being business in any action," &c., do not apply to the previous part of

that section. When we come to the use of the same words in rules which provide only for conveyancing business there undoubtedly is a difficulty. Still, in my opinion, we ought to hold that in the rule these words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master" apply only to what is called other business. The order had already defined what the business was to be, the fees for which were to be regulated by the order, viz., "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing," and then, I suppose *ex abundanti cautelâ*, but causing a difficulty from that very abundant caution, the words are added "or other business not being business in any action," &c.

The third ground of objection raises a more difficult point. We have already laid down that to entitle a solicitor to the *ad valorem* charge fixed by the schedule he must do the whole of the things which are mentioned collectively as constituting the business for which the scale fee is allowed. In one case, *In re Wilson* (1), we had to consider the right of a vendor's solicitor to charge the scale fee "for conducting a sale of property by public auction, including the conditions of sale." We held that although employing an auctioneer did not prevent the scale from applying, because of course the solicitor could not take the bids, yet if substantially the auctioneer did business which was part of the conducting of the sale besides receiving the bids, then the solicitor who employed that auctioneer was not entitled to the scale fee, because he had not done all that was referred to, he had not conducted the sale, he had only done part of the conducting of the sale. Here we have to consider whether the solicitor of the *Merchant Taylors' Company* has within the meaning of the rules and of the schedule investigated the title to freehold, copyhold, or leasehold property, and prepared and completed the conveyance. The question really is whether he has investigated the title. On that we have felt considerable doubt. This objection was not originally taken by the railway company, and Mr. *Romer* desired that the matter should go back to the Taxing Master, so that this objection should be stated, and that we should have the reasons of the Taxing Master for holding the scale fee to be payable. I

(1) 29 Ch. D. 790.

C. A. 1885

In re MERCHANT TAYLORS' COMPANY.

Cotton, L.J.

must say for myself I am glad that that course was taken, because we have had in consequence considerable assistance from the Taxing Master in the reasons which he has given, and which, as I understand, were submitted by him to two at least of the other Taxing Masters, so that we have had their assistance, and since then we have also had the assistance of one of the Chief Clerks, who knows what is done in cases of purchases under the direction of the Court. The argument in support of the objections was that the scale of charges is fixed with reference not only to the work done, but to the responsibility undertaken by the solicitor. Undoubtedly that is so, for of course mere doing of work without responsibility would not be paid for at the same rate as work with a responsibility attaching to the due and proper performance of it. It was urged that conducting an inquiry in Chambers as to whether there is or is not a good title does not put upon the solicitor the same responsibility as he is subject to if he himself, not under the direction of the Judge in Chambers, has to investigate a title for anyone who is purchasing. Considerable weight is due to that objection. But then we learn, not only from the Taxing Master's reasons, but from the inquiries which we have made, that a solicitor acting for the purchaser under the direction of the Court, does all which he would have to do if he were independently investigating the title, though he has not the same responsibility in the one case as in the other. Therefore, in my opinion, as the solicitor acting under the direction of the Judge does everything which he would do in an independent investigation of the title, the case comes within the words of the rules and schedule, and I do not see any such manifest inconvenience in allowing the scale to be applied to such a case as would justify us in saying that it does not apply. There are, as was pointed out by the Taxing Master, conveniences in allowing the scale to apply to such a case as the present. It reduces matters to something like uniformity, and it enables parties to know without difficulty what will be the charge they will have to bear, whether the investigation is out of Court, or whether it is in Court by inquiry in Chambers as to the title. In my opinion, therefore, as the case comes within the words (because as a matter of fact the solicitor has investigated the title) we

ought not to be hindered from so construing the words as to include this case, simply because we think that the solicitor does not incur the same amount of responsibility as if he had acted independently. In my opinion, therefore, the appeal fails.

LINDLEY, L.J. :—

I am of the same opinion. The question whether this reinvestment of money in land comes within the expression "sales under the *Lands Clauses Consolidation Act*, or any other private or public Act under which the vendor's charges are paid by the purchaser," appears to me one that is very easily disposed of. This is a purchase. It is not a sale under the *Lands Clauses Consolidation Act* at all, nor is it a sale in which the vendor's charges are paid by the purchaser. Rule 11 of Schedule I. therefore does not apply.

Now, as to the 2nd rule of the General Order under the *Solicitors' Remuneration Act* it appears to me that the construction which was put upon it by Mr. Justice *Kay* in *Stanford* v. *Roberts* (1) was right, and that the words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master" do not refer so far back as "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing," but are referable, according to the proper construction, to the last antecedent "other business," that is to say other than that which is specifically mentioned.

Then there remains only the third point, which is whether the expression of Schedule I. Part I., "for investigating title" applies to a solicitor who effects a purchase under the direction of the Court, or whether it ought to be confined to a solicitor investigating title under ordinary circumstances. The expression "investigating title" appears to me to be as applicable to the one kind of business as to the other. The Taxing Master states that in point of fact, so far as the actual investigation of title is concerned, there is no material difference, but it is certainly true that a solicitor, who conducts a sale or has the management of a purchase under the direction of the Court, is relieved to a certain extent, and not to an inconsiderable extent, from responsibility.

(1) 26 Ch. D. 155.

C. A. 1885 *In re* MERCHANT TAYLORS' COMPANY. Lindley, L.J.

The responsibility of deciding difficult questions is taken by the Chief Clerk or by the Judge in lieu of the solicitor. But when we come to look at the question whether this ought to make any difference in the construction of the schedule, I am of opinion that it ought not. The scale, if our construction of the rules is right, is in point of language as applicable to the one class of business as to the other, and the scale was fixed by persons who knew perfectly well what they were about, and whose duty it was, under the Act of Parliament, in fixing the scale, to consider the skill, labour, and responsibility involved in the business for which the remuneration was fixed. There is no trace of any such thing as varying the scale in individual cases in respect of responsibility incurred in one case and in another. Take the case, for example, of a solicitor employed by an eminent conveyancer. The solicitor comes to a difficulty and reports it to his client. The client says: "I am willing to take the risk of that." There is nothing that I can find which shews that the solicitor, although exonerated from responsibility in such a case as that, is to be paid otherwise than by the scale. Neither do I see any indication of an intention to make a difference in the charge because the responsibility is less in the cases of sales and purchases in Chambers. I think the Taxing Master is right when he says that the business and work done is at least as onerous. I rather fancy that it is more troublesome than when the sale or purchase is not conducted in Chambers. It is very true there are attendances for which charges can be made, but I do not see any reason to suppose that solicitors are better paid for sales and purchases under the direction of the Court than they are in other cases, and, in fact, I think they are probably rather worse paid.

It appears to me to be of the utmost importance that we should lay down a rule which can be applied readily to matters of business, and not give rise to subtle distinctions which lead to constant embarrassment; and on the true construction of the Act, the rules, and the scale, it appears to me that the view taken by the Taxing Master is right, that this is a case in which the purchaser's solicitor has investigated the title within the true meaning of Part I., Schedule I., and that the appeal ought to be dismissed.

FRY, L.J. :—

I am of the same opinion.

With regard to the first point, which arises on the 11th rule, it appears to me to be plain that the investment of money produced by a sale under the *Lands Clauses Consolidation Act* does not come within the words "In cases of sales under the *Lands Clauses Consolidation Act*." Ingenious as was the argument addressed to us on this point, it is one which cannot possibly prevail.

Then with regard to the second question, which arises upon the construction of the words "in respect of other business not being business in any action or transacted in any Court or in the Chambers of any Judge or master," I am of opinion that the same construction must be put upon those words in the Act of Parliament and in the General Order. I, like my Brother Judges, have arrived at the conclusion that the words "not being business," &c., refer to the immediate antecedent "other business," and are not to be extended as an exception to apply to the whole of the business which is referred to in the previous words of the section of the Act of Parliament and the rules of the General Order. I think that the reasons which have been given both by my learned Brethren and also by Mr. Justice *Kay* in the case in which the question first arose are correct.

Then upon the third point, which is whether the solicitor who assists the Chief Clerk or the Judge in Chambers in answering the inquiry whether a good title can be made, is entitled to the scale fee for investigating the title. I had for some time considerable doubt, but it appears to me that the solicitor, before he can render proper assistance to the Judge in Chambers, must investigate the title, and that therefore the business which he transacts is within the words of the scale. I rely also very much upon the statement made by the Taxing Master (and which is borne out distinctly by the statement made to us by the Chief Clerk whom we have consulted), that "the course of the business, viz., the work done by the solicitor, for which the scale fee is allowed, is precisely the same whether or not the sale or purchase is carried out under the direction of the Court, except that where the approval of the Court is necessary the conveyancing counsel employed is selected by the Court instead of by the solicitor."

C. A. 1885 *In re* MERCHANT TAYLORS' COMPANY. Fry, L.J.

Undoubtedly it is quite true that the responsibility of the solicitor in assisting the Judge in answering the inquiry is somewhat less than it is when he takes upon himself the investigation of the title for a lay client. But it appears to me that we ought not to draw fine distinctions between the different cases of responsibility of a solicitor investigating title, and that the decision at which we have arrived is a decision not only in accordance with the very words of the scale, but also in accordance with the course of business and the convenience of the suitors of the Court. The appeals therefore will be dismissed with costs.

Solicitors: *W. F. Fearn; A. G. Parson; R. Ward.*

H. C. J.

C. A. 1885 *June* 29, 30.

In re JOHNSON AND TUSTIN.

[1884 J. 680.]

Vendor and Purchaser—Abstract of Deed not in Vendor's Possession—Expense of making—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.

A vendor is bound at his own expense to produce to the purchaser a proper abstract of title, either for the statutory period of forty years, or for such other period as may be agreed upon, and sect. 3, sub-sect. 6 of the *Conveyancing Act*, 1881, is not intended to interfere with the performance by the vendor of that duty, but proceeds on the assumption that the vendor has produced such an abstract.

Therefore on an open contract the vendor must bear the expense of procuring and making an abstract of any deed forming part of the forty years' title, although such deed be not in his possession.

The word "abstract" in that sub-section is to be distinguished from the "abstract" of title to which the purchaser is entitled; and a purchaser cannot be said to "require an abstract of a particular deed," merely because he requires an abstract of title for the prescribed length of time, which involves the abstracting of that deed.

Decision of *Pearson*, J., reversed.

THIS was an appeal by *C. D. Tustin* from a decision of Mr. Justice *Pearson* (1) upon a summons under the *Vendor and Purchaser Act*, 1874, whereon he held that the Appellant, a purchaser on an

(1) 28 Ch. D. 84.

open contract, was bound to pay the vendor the expense of abstracting a deed not in the vendor's possession, although that deed formed part of the forty years' title which, in the absence of stipulation, the purchaser was entitled to require.

With reference to the requisition made by the purchaser, an affidavit was put in by his solicitor, who stated that an abstract commencing with a deed dated the 12th of December, 1860, was furnished by the vendor, and also a print of an Act of Parliament to incorporate the *London Necropolis Company*; that he thereupon required the vendor's solicitors to produce the title for the statutory period of forty years, instead of commencing it with the said deed of the 12th of December, 1860; that the vendor's solicitors ultimately sent a further abstract commencing with a deed of conveyance to the company dated the 14th of October, 1854.

And it appeared that the purchaser was satisfied with the abstract of this deed, and did not require any further abstract.

On the other hand, the vendor relied on a letter of the 8th of March, 1884, written by the purchaser's solicitor, as demanding that the deed in question (the 14th of October, 1854), should be abstracted. The effect of this evidence is stated by Lord Justice *Cotton* in his judgment.

H. J. Hood, for the Appellant:—

The whole of sub-sect. 6 presupposes that the vendor has furnished a proper abstract of title, that is, of all the documents in his possession, and of which he can procure production. Before the Act the vendor was bound to do this at his own expense, and there is nothing in this sub-section which removes that obligation. A distinction must be made between "abstract," meaning "abstract of title," and the "abstract of a particular deed or document;" and it is only with the latter abstract that the sub-section is dealing. If the purchaser had desired to verify that abstract, and required production of the deed, he would have been compelled to pay for it.

The decision as it stands would be very prejudicial to a purchaser. Many cases can be put where a vendor might compel a purchaser, who is of course ignorant of the true state of the title, to accept an unreasonably short title, or to run the risk of

C. A. 1885 — *In re* JOHNSON AND TUSTIN.

being involved in expense out of all proportion to the value of the property, if he desires a title of reasonable length.

The vendor can protect himself by conditions from excessive expenses, the purchaser cannot.

Swinfen Eady, for the vendor:—

The vendor produced a perfectly good holding title for twenty-four years, beginning with a conveyance in fee to the vendor, from a public company. No doubt before the Act the costs of abstracting this deed would have been payable by the vendor, but an alteration has been made by the Act in his favour; and although he still has to produce an abstract of all the deeds in his possession, the Act now throws on the purchaser the costs, when the deeds or documents are not in the vendor's possession. The vendor may well be bound to deliver an abstract without being compelled to do so at his own expense.

There can be no such distinction as suggested in the use of the word "abstract." The sub-section assumes that the vendor may be compelled to deliver a further abstract, that must mean a material abstract, and if so, it forms part of the title, for a purchaser cannot require anything that is immaterial to be produced.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson*, who has held, under the *Conveyancing Act*, 1881, sect. 3, sub-sect. 6, that in this case the purchaser is bound to pay the expenses of a copy of a deed, which forms part of the title, and which is not in the possession of the vendor.

The contract is an open one, and does not contain any stipulation as to the commencement of the title, or any stipulation restricting the ordinary right of the purchaser. What was sent in as the abstract of title was an abstract going back only some twenty-four years. Subsequently there was produced an abstract of an earlier deed of 1854, and the question is whether the purchaser is to pay for that abstract.

It is, I think, not immaterial to see what was done by the purchaser. There is an affidavit put in by the purchaser's solicitor, in which he says that after he received the abstract of title,

clearly not going back so far as by law the purchaser may require a title to be shewn, "I thereupon required the vendor's solicitor to produce the title for the statutory period of forty years, instead of commencing it with the said deed of the 12th of December, 1860."

Then he goes on to say, "The vendor's solicitor ultimately sent a further abstract commencing with a deed of conveyance to the said company dated the 14th of October, 1854, which abstract is now produced and shewn to me, and marked with the letter C."

From that it would appear that what the purchaser said was this, "I am not content with a title going no further back than 1860, you must shew an earlier title," and then not having asked at that time for this deed, the vendor's solicitor sent an abstract of the deed to him. (Although that was not a forty years' title, the purchaser does not require the vendor to go further back.)

It is said on behalf of the vendor that is not so, because, by a letter of the 8th of March, 1884, it is in fact shewn that what the purchaser really did was to require in terms the production of this deed. But we have the statement in the affidavit of the purchaser's solicitor, which I have read, and when we read this letter of the 8th of March, 1884, it is, in my opinion, in no way inconsistent with the demand generally for an earlier title. The suggestion for the production of this deed as the beginning of the title, may well have taken place before this letter was written, and this letter may have been written in answer to a suggestion made by the vendor's solicitor: "Why should you want this; there is a perfectly good title in what you have already had?" and the purchaser may have been dealing with such a suggestion, although we have not the earlier letter before us.

That being so, we come to sect. 3 of the *Conveyancing Act*, and, in my opinion, sub-sect. 6 of that section is dealing with what is the duty of the parties in their respective positions. It is the duty of every person who sells property to shew a title for the statutory period, or for the period to which, by arrangement between the parties, the title has been limited. I think that is his duty. Of course the purchaser, before he gets the abstract, cannot know what deeds are necessary in order to shew the title. He only says, "I know nothing about your title, in the conditions

C. A. 1885

In re JOHNSON AND TUSTIN.

Cotton, L.J.

of sale you say nothing about it, all I require is a forty years' title, and I require the abstract to be supplied in the ordinary way."

In my opinion this sub-sect. 6 assumes, and does not intend to interfere with, the performance of that duty by the vendor, and it is dealing only with the expenses of requisitions made on the footing of the abstract by the purchaser, so far as he requires verification or information as to the title shewn thereby, by the production of deeds, or abstracts of or copies of documents which are not in possession of the vendor.

In my opinion it cannot be said that a purchaser requires a copy or abstract of a particular deed simply because he requires a title of a length which would involve abstracting that deed. His requisition is this, "Give me a forty years' title." That involves, no doubt, but it is not the same thing as, having delivered to him an abstract of a particular deed, although that deed would be a necessary ingredient in the title to be shewn for forty years.

What are the words of the Act: "The expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament, or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same."

Now, in my opinion, when a man says that he requires a forty years' title he is doing something very different from requiring the abstracting or copying of the particular deeds. He is saying: "I must have the title." If, when he gets the title properly made out he then requires something more, and that involves making a copy of, or abstract of, a document not in possession of the vendor's solicitors—if he is not willing to take the word of the vendor or his solicitor—this Act of Parliament imposes on him payment of the expense he occasions, so far as it involves taking copies of, abstracting, or producing, documents not in the vendor's possession. We must have regard to the state of things

which I think the Legislature must be taken to be here dealing with, notwithstanding, undoubtedly, there are words in the latter part of the section I have read which have been very much pressed upon us, but which I cannot see the reason for unless they have reference to the perfecting of the abstract. The difficulty is caused, as so often happens in argument, from the fact that the word "abstract" is used in two senses. The "abstract of title" is one thing and "abstract of deeds" is another, and although it is not necessary in my opinion to shew what abstract of deeds, not coming in the abstract of title, the purchaser may usefully require, yet it cannot be said that no such case can arise; it may be a mere incidental matter which the purchaser may require to have cleared up, he ought to pay the expenses of that. It is not necessary, in my mind, to shew what it is that is referred to, or to point out the particular case that probably is referred to, if we see that upon the whole construction of this sub-section, the Legislature is dealing with what is to be done when the vendor has done his duty by producing the abstract. It is said here that the vendor has produced an abstract; and that, therefore, the Legislature is dealing with the state of things which was subsisting when the first abstract was sent in. In my opinion that abstract is not such an abstract as it was the duty of the vendor to produce. Even if this abstract does shew a good holding title it is not a title which by law on an open contract he was bound to produce and deliver; and, therefore, as no proper abstract of title for forty years had been given, which involved getting an abstract of this deed, the cost of the copying of which must be paid by him, I cannot agree with the decision of Mr. Justice *Pearson*, and I think the vendor ought to bear the costs.

LINDLEY, L.J.:—

I am of the same opinion.

The language of clause 6 of sect. 3 no doubt at first sight gives rise to difficulty, but when we come to look at that clause we are struck with this, that there is nothing about abstract of title in it. When we compare clause 6 with other clauses of the section which do relate to the title—for instance, clauses 1, 2, 7, and others—the conclusion at which I have arrived is, that clause 6 does not relate at all to the title to be shewn, but to the produc-

C. A. 1885 *In re* JOHNSON AND TUSTIN. Lindley, L.J.

tion of deeds and similar matters, the assumption being that a proper title is shewn. I see nothing in clause 6 which warrants the notion, that a vendor who does not stipulate as to commencement of title is not bound to shew a forty years' title. On the contrary, I think that sub-sect. 6 assumes that he shews such a title as he is bound to shew, either a forty years' title, or if there is any condition, such a title as is consistent with the condition. If we start from that, there is not the slightest difficulty in construing clause 6. It is perfectly applicable to the case where the vendor has shewn a proper abstract of title. Abstracted deeds have to be produced, information of all kinds to be obtained, the cost of which, at all events, is thrown upon the purchaser; but I cannot read this section as amounting to this, that the vendor need only shew an abstract of title, so far as he has got the deeds to shew it. He is to shew a proper title. That is the assumption upon which the whole section proceeds. I think that Mr. *Hood's* argument is unanswerable. The summons is this: "That it may be declared that the purchaser is entitled to a proper abstract of the vendor's title to the subject-matter of the above contract at the expense of the vendor."

I think that the construction which has been put upon the clause by Mr. Justice *Pearson* is erroneous, and that the declaration ought to have been made in the way asked for by the summons.

FRY, L.J.:—

I also am unable to agree with the conclusion of the learned Judge in the Court below.

I do not arrive at this conclusion from the particular form of the requisition, or from there being a requisition of forty years' title; and I particularise that because, in my view, it is not very material what form the requisition took, provided it was in substance a requisition for an earlier title to the land.

It appears to me that the 6th sub-section of the 3rd section of the Act in question does throughout assume that the proper abstract has been delivered by the vendor to the purchaser. In my view it deals entirely with matters subsequent to that delivery.

The very first words are, "On the sale of any property, the expenses of the production and inspection of all Acts of Parlia-

ment, inclosure awards, records, proceedings of Courts, Court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession." Now, what is to define those documents so to be produced? The abstract, which is to be furnished by the vendor. Until that abstract is furnished the purchaser has no means of ascertaining what the documents are, of asking for them, or knowing the expense of them.

No doubt it has been pressed upon us that the section assumes that further abstracts may have to be delivered. It has been said that those abstracts may be either material or immaterial; if they are material they form part of the title; if they are immaterial there is no right to their production. It appears to me that that is not the necessary conclusion. There are certain incidental circumstances which sometimes arise in the course of the investigation of the abstract, in respect of which the vendor may be willing to furnish information, and which are not, strictly speaking, a part of the abstract. This clause, I think, applies to furnishing such deeds and such abstracts.

I cannot help thinking that the balance of convenience is very greatly in favour of the decision at which we have arrived; and in saying that I bear in mind that the Act of Parliament was framed in favour of the vendors. But as matter of practice it would be extremely inconvenient to come to the conclusion at which Mr. Justice *Pearson* has arrived in this case. The vendor knows what his title is. The purchaser does not know the title. The vendor can by conditions protect himself from a disclosure of title which he cannot easily obtain. The purchaser cannot know what the obligations he is entering into may be, because he is ignorant of the title; and therefore he would be unable to protect himself from the alternative inconvenience of either having to take a title possibly very short and imperfect, or having to pay for a title the length of which he has no means of knowing.

I think, therefore, that this appeal must be allowed. The result will be, that a declaration will be made in accordance with the summons, with the costs here and the costs below.

Solicitors: *Lee & Pembertons; Hicklin, Washington, & Pasmore.*

BIBL. LONDIN UNIV.

C. A.
1885
June 25;
July 4.

In re PORTAL AND LAMB.

[1884 P. 1859.]

Will—Specific Devise of "my cottage and all my land at S." "in their present state"—Residuary Devise—Subsequent Contract to purchase a House and Land at S.—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24 [*Revised Ed. Statutes, vol. viii. p.* 29].

A. devises to *G.* for life, "my cottage and all my land at *S.*," subject to the stipulation (among others) that the plantations, heather, and furze be all preserved "in their present state," and devises "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever" to trustees upon trust for sale. At the date of his will *A.* had a small cottage with twenty-two acres of rough land held with it, and he subsequently contracted to purchase from *G.* a house of considerable size with gardens and land comprising ten acres closely adjoining the cottage and land. The contract was not completed at his death:—

Held, that a contrary intention within the meaning of the 24th section of the *Wills Act* was not shewn with sufficient clearness, but that, construing the will as if it had been made on the day of the testator's death, having regard to the circumstances at that date and to the residuary devise, the specific devise more aptly referred to the cottage and rough land, and did not carry the after-acquired property.

The words "all my land at *S.*" would, if used alone, have been sufficient to carry the after-acquired land with the house standing upon it; but upon the authority of *Ewer* v. *Hayden* (1), by force of the context the word "land" must be taken as confined to lands in contradistinction from buildings.

Decision of *Kay*, J., reversed.

Semble, *Per Lindley*, L.J.:—Sect. 24 of the *Wills Act*, which provides that a will shall speak as to the real and personal estate comprised in it (*i.e.*, the will) from the day of the testator's death, leaves open the question whether a particular property passes by the specific or the residuary devise.

THIS was an appeal from a decision of Mr. Justice *Kay* upon a summons taken out under the *Vendor and Purchaser Act*, 1874, holding that, by force of sect. 24 of the *Wills Act*, a specific devise of "my cottage and all my land at *Stour Wood*" . . . . "on the condition that no fir or other trees or shrubs thereon be cut down and removed, and that the boundary fences be kept in good preservation, and the plantations, heather, and furze all preserved in their present state" passed a house of considerable size with gardens and lands of ten acres adjoining or contiguous to the

(1) Cro. Eliz. 476, 658.

cottage, which, after the date of the will, the testator entered into a contract to purchase, and which contract was not completed at his death, notwithstanding a residuary devise of "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever" to trustees upon trust for sale. The case is reported before Mr. Justice *Kay* (1).

The testator at the time of making his will had a small cottage let at about £5 per annum with some twenty-two acres of rough land held therewith. At the time of his death he had contracted as before mentioned to purchase from his son the house and grounds in which he was then residing and which adjoined the cottage and the land held therewith.

The trustees, treating the after-acquired property as falling within the residuary devise, had recently contracted to sell it to the son, *G. H. Lamb*, the specific devisee, and he having raised the objection that it formed part of the specifically devised property, they took out the summons upon which Mr. Justice *Kay* made the order complained of. The trustees appealed.

Barber, Q.C., and *Hamilton Humphreys*, for the Appellants:—

The conditions attached to the gift are only strictly applicable to the cottage and lands specifically devised. The devise must be co-extensive with the conditions, and they shew the contrary intention within the section: *Cole* v. *Scott* (2); *Douglas* v. *Douglas* (3).

But further, treating the will as if it had been made on the day of the testator's death, the property would not have passed by the specific devise. The words "all my land at *Stour Wood*," if they had stood alone, would have carried subsequently acquired land with houses, and everything on that land, but from their context, the words "my cottage" have the effect of excluding the house, shewing that the testator used the word "land" in contradistinction to house: *Ewer* v. *Hayden* (4).

Bramley, for the specific devisee:—

There is no contrary intention within the meaning of the

(1) 27 Ch. D. 600.
(2) 1 Mac. & G. 518.
(3) Kay 400.
(4) Cro. Eliz. 476, 658.

C. A. 1885 *In re* PORTAL AND LAMB.

section, and the will must be read as if, at the making of it, he possessed this house and land. Unless two dates, the date of the will and of the death, are pointed out in the will, any words like "now," "in its present state," &c., must be treated as referring to the death: *In re Ord* (1); *Hepburn* v. *Skirving* (2).

The words of the specific devise are quite large enough in themselves to pass the after-acquired property. The word "land" includes every hereditament. In *Ewer* v. *Hayden* (3) the Court held that the joinder of the words "meadows and pastures" with lands shewed that the testator meant arable lands, but that is only a decision on the particular devise and is no authority on this devise. Here the general rule applies that "land" includes every hereditament.

Barber, in reply.

July 4. COTTON, L.J.:—

This is an appeal arising on a summons under the *Vendor and Purchaser Act*, 1874, but the only question is as to the true construction of the will of the testator from whom the property is derived. Looking at the will by itself, I do not think that there would be much difficulty in the case. But we must have regard to sect. 24 of the *Wills Act* in construing the will:—[His Lordship read the section and the will as set out, and continued:—] It has been contended that there is sufficient in this devise of "my cottage and all my land at *Stour Wood*" to shew an intention that this will should not be construed as to the property comprised in it as speaking from the death of the testator. But in my opinion there is not enough to shew an intention on the part of the testator to exclude the provisions of sect. 24. The real question we have to consider is this: looking at the statute, and bearing in mind that this will is as "to the property comprised in it to take effect as if it had been executed immediately before the death of the testator," what does this description aptly apply to, especially having regard to the existence of the residuary devise? It is necessary to refer shortly to the facts of the case.

(1) 12 Ch. D. 22. (2) 4 Jur. (N.S.) 651.
(3) Cro. Eliz. 476, 658.

C. A. 1885 *In re* PORTAL AND LAMB. Cotton, L.J.

The testator had at the time of his death two properties, held under different titles. One property he had held for a considerable period before the date of the will, consisting of a small cottage and a piece of rough land held with it, some twenty-two acres in all, covered with gorse and fir trees. But at the time of his death he had besides, adjoining or contiguous to the cottage and rough land, a house with garden and grounds belonging to it, comprising in all some ten acres. In that house he was residing at his death, and he had entered into a contract to purchase it from his son, which contract was not completed at his death. The question therefore comes to this: To what property, having regard to these facts, does this description more aptly apply? If it were not for this section of the *Wills Act* there can be no doubt but that when the testator referred to "my cottage and all my land at *Stour Wood*" he meant specifically to devise that cottage and the land held with it which he then held, and that only. But we have the *Wills Act*, which says the will shall be construed as if it had been made at a time other than that at which in fact it was made. The words "and all my land at *Stour Wood*" are no doubt sufficient by themselves to carry the after-acquired land and the house on it; but that is not all, we have "my cottage" preceding these words, and when we find that at his death he had the small cottage and also this larger house in which he was then residing, and which was a gentleman's residence with gardens and pleasure-grounds, all which would pass under the description of a house, I cannot but think that what passed by the devise was that, which was aptly described, the small cottage which he had held and the land he had held with it, and that only; and for this reason, "my cottage" does not aptly describe the subsequently purchased house, and when we come to the words "and all my land at *Stour Wood*," although such a devise by itself would carry with it any house standing on that land; yet when these words are added to the previous description of "my cottage," in my opinion it shews that "all my land" in this particular case was not intended to include this residence with the garden and grounds held with it. Construing, then, this will as made immediately before the death of the testator, I think that upon its true construction this specific devise applies only to the

C. A. 1885 *In re* PORTAL AND LAMB. Cotton, L.J.

cottage strictly so called which he had held for so long a period, and the particular bit of land connected with it, and does not include the house in which he was residing at the time of his death, which had land with it, and which would have been more aptly described as "my house at such a place" rather than "my cottage."

The case of *Ewer* v. *Hayden* (1) in *Croke's* reports lays down the principle on which this case must be decided, because there the word "lands," which but for the context would have included a certain house, was by force of the additional words "meadows and pastures" cut down so as to confine the meaning of the word "lands" to lands not occupied by buildings. The marginal note is this:—"A man has houses and land in *A.*, and land and houses in *B.*, and devises his houses and land in *A.* with all his other lands, meadows, and pastures in *B.* The houses in *B.* do not pass." It was there held that the context restricted words which in themselves without that context would have included the houses in *B.* So here, in my opinion, this after-acquired property passes by the residuary devise, and not under the specific devise of my "cottage and all my land."

LINDLEY, L.J.:—

I am of the same opinion. I cannot help thinking that any one reading this will apart from the terms of sect. 24 of the *Wills Act* would come to a clear conclusion that the construction put by Mr. Justice *Kay* on this will, under the supposed pressure of that Act, defeats the intention of the testator. If we are to look at his intention as expressed, I think there is no doubt whatever as to what the testator meant. He disposed specifically of all the land he had at the time by describing it as a cottage and all the land held within the parish named, and then the language he uses about the fir-trees and boundaries shews that he was dealing with, and intending to deal with, that which was then present to his mind; and that he did not intend under the expression "all my land in the parish," to include any lands which he might afterwards acquire. That is made still plainer by this, that he takes the trouble in the same will to state what he wished to be

(1) Cro. Eliz. 476, 658.

done with all the property that he may have which does not answer that particular description, saying it is to pass under the residuary devise. There is no intestacy, and if we only look at the will it is plain that his intention was to dispose specifically of that cottage and land, and his intention was that all other the property which he might hold at his death should pass under the residuary devise.

It is said that we are precluded by the section from giving effect to this plain intention. I am always unwilling to strain this Act or any other Act in such a way as to defeat a man's plain intention. The object of this section was not to defeat, but to give effect to the testator's intention. The mischief intended to be met by the Act was, that under the old law the testator's intention was perpetually being defeated by the narrow construction put upon such a gift as this.

The question is, are we bound by this section to defeat this intention? I think not, and for this reason. We must examine the section carefully. [His Lordship read the section and continued:—] That refers to the real and personal estate comprised in the will, and nothing else. It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death. Applying, then, that rule to this will, we look to see what is the real estate comprised in it? It is to be observed that the Act speaks of it—that is, the will. When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will. Be it so. The question still remains which clause carries the property, the residuary or the specific devise? If a testator devises all his lands in the parish of *B.*, and then makes a residuary devise of all his other lands, the former devise will carry all other land which he may subsequently acquire in that parish under sect. 24 of the statute, unless there is an intention to the contrary. But when we are asked to extend the words "my cottage and land," so as to include that which he had not got, and that which, if he had it, would not be ordinarily described by such words, I see no reason for doing anything of the kind. It is incredible to my mind that a man having a small cottage and

C. A. 1885 *In re* PORTAL AND LAMB. Lindley, L.J.

land, and having contracted to buy a gentleman's house with some adjoining land to be occupied with it, would use such a description as "my cottage" and "all my land" if he had intended this house to pass. The words "all my land at *Stour Wood*" are ambiguous—if they had stood alone they would have passed the after-acquired property; but in connection with the words, "my cottage," and the rest of the clause, it does not appear to me that the testator could have meant to describe this house and land even if he had had them at the date of his will.

FRY, L.J.:—

I am of the same opinion. I do not propose to express any opinion whether the date of the will can be referred to in construing the will as between a specific and residuary devise. I am far from expressing any doubt upon the view enunciated by Lord Justice *Lindley*. But I will assume that the will is to be construed as if it had been made on the day of the testator's death, and I will ask myself what was the state of circumstances of the testator and his property on that day. He had been in possession for years of a cottage at *Stour Wood*, and twenty-two acres of land adjoining, and he had shortly before his death entered into a contract for the purchase of a gentleman's house with gardens and adjoining lands of about ten acres. That contract was not completed. In that position of things I will assume him to be making his will, and in that he gives "my cottage and all my land at *Stour Wood*" to the specific devisee, and he gives all the residue of his property to his trustees. What is the meaning of the words "my cottage" when used by a testator speaking under such circumstances? It appears to me to be plain that by those words he indicates not the house which he had entered into this uncompleted contract to purchase, but the cottage, properly described as such, of which he had been the owner for several years. What then does he mean by all "my land at *Stour Wood*," following the words "my cottage." It is, I think, plain that by using those words in the context in which he has used them, by "land" he meant land not covered by or occupied by buildings. Therefore it appears to me that it must exclude this gentleman's house which he had contracted to purchase, because that was not land

within the meaning of the word "land" as contrasted with "cottage?" Under these circumstances I think that the property passed, not by the specific, but by the residuary devise, that the Appellants who took out the summons were right in their contention, and that the appeal must be allowed.

C. A. 1885 *In re* PORTAL AND LAMB.

Solicitors for Appellants: *Johnson & Weatherall*, agents for *Lamb, Brooks & Sherwood, Basingstoke.*

Solicitors for Respondents: *Longbourne & Stevens.*

M. W.

GANDY *v.* GANDY.

[1883 G. 2525.]

C. A. 1884 V.-C. B. *May* 15. C. A. 1885 *June* 5: *July* 13, 14.

Husband and Wife—Separation Deed—Covenant with Trustees to maintain Children—Right of Child to sue—Cestui que trust—Stranger suing on Covenant—Practice—Action—Parties—Mistake—Amendment—Rules of Supreme Court, 1883, *Order* XVI., *r.* 2.

To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract.

By a deed of separation between husband and wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, and provided also that the covenants by the trustees were duly observed and performed: provided, also, that the two youngest daughters should live at such place (being reasonable and proper for the purpose) as the husband should direct, and should be maintained and educated at his expense, the husband and wife to have all reasonable access to them. And the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife and two eldest daughters, and against all molestation by them, and that the wife would not take any proceedings against the husband for alimony, except as aforesaid; and that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, and the place at which they should live, and would permit them, if they so desired, and without any interference on the part of the wife, to accept any invitation of the husband to reside with him.

On one of the two youngest daughters subsequently attaining sixteen,

C. A.
1885
GANDY
v.
GANDY.

the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband and the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs, and *Bacon*, V.C., gave a judgment for enforcing the covenant :—

Held, on appeal, that upon the construction of the deed, the Plaintiff was not in the position of *cestui que trust* under the covenant so as to entitle her to maintain the action, but liberty was given to her, under the Rules of the Supreme Court, 1883, Order XVI., r. 2, to amend the writ, by adding the trustees, the wife, and the other daughters, or any of them, as Plaintiffs.

Touche v. *Metropolitan Railway Warehousing Company* (1) considered.

The trustees refusing to be joined as co-Plaintiffs, the statement of claim was amended by making the wife a co-Plaintiff :—

Held, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue she could sue in equity.

After the separation deed the husband committed adultery, and a decree was made for judicial separation, giving the custody of the two youngest daughters to the wife. After this the wife applied for increased alimony, which was granted by the President, but his decision was reversed on appeal (2), both the arguments and the judgment of the Court of Appeal proceeding on the footing (though the Court did not expressly decide the point) that the husband remained liable under the deed to pay for the maintenance and education of the two youngest daughters. He now contended that his covenant was put an end to by the custody of the youngest daughters being given to his wife :—

Held, that he was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued, and at the same time to insist that his liability under it had determined, and the appeal was ordered to stand over, with liberty to the wife to apply to the Divorce Court for increased alimony, if she should be so advised.

BY a separation deed dated the 26th of June, 1879, and made between the Defendant, *Maurice Gandy*, of the first part, *Elizabeth Gandy*, his wife, of the second part, and the Defendants *Stephenson* and *Mylcrist*, the trustees of the deed, of the third part; after a recital that the said *Maurice Gandy* and *Elizabeth Gandy* had agreed to live separately from each other for the future, and to enter into the covenants thereinafter contained, *Maurice Gandy* covenanted with the trustees in the usual form to allow *E. Gandy* to live separate from him, and not to take any steps to compel her to return to cohabitation, and for the enjoyment by her of

(1) Law Rep. 6 Ch. 671. (2) 7 P. D. 168.

her property for her separate use. By a second witnessing part *M. Gandy* covenanted with the trustees that he, his heirs, executors, or administrators would "during the continuance of these presents, and if the said *Elizabeth Gandy* shall survive the said *Maurice Gandy*, then during the life of the said *Elizabeth Gandy*, subject to the due performance of the covenants herein contained, pay to the said trustees, for the use of the said *Elizabeth Gandy* and her daughters, other than her two youngest daughters, the annual sum of £252 by monthly payments . . . and further, that he, the said *M. Gandy*, will also pay to the said trustees all the expenses connected with the maintenance and education of the two youngest daughters of himself and his said wife, provided that the said trustees permit the said daughters to go to such school as the said *M. Gandy* shall from time to time direct, and provided also that the covenants herein contained on the part of the said trustees are duly observed and performed: Provided also, that the said *E. Gandy* shall not be entitled to the custody of the said two youngest children, but they shall remain and live at such place or places (being reasonable and proper for that purpose) as the said *M. Gandy* shall direct, and shall be maintained and educated at the expense of the said *M. Gandy*, but the said *M. Gandy* and *E. Gandy* shall have all reasonable access to and intercourse with them, and they may from time to time temporarily reside with the said *M. Gandy*." And the trustees covenanted with *M. Gandy* that they would, during the continuance of the separation, keep him indemnified against all debts and liabilities thereafter to be contracted by the said *E. Gandy*, or her said two daughters, for the maintenance and support of herself and her said two daughters (except the expenses connected with the maintenance and education of the two youngest children, as thereinbefore provided for), or otherwise, and against all molestation on the part of the said *E. Gandy* and her daughters (other than as aforesaid), and against all actions, &c., on account of such debts and liabilities; and also that the said *E. Gandy* would not, nor any person on her behalf, thereafter commence any proceedings against the said *M. Gandy* for alimony, except as aforesaid; and that they, the said trustees, would, on the said *M. Gandy* defraying all the expenses connected therewith as afore-

C. A. 1885 GANDY v. GANDY.

said, carry out his desires in respect to the school or schools at which his two youngest daughters should be educated, and the place or places at which they should live, as he might from time to time direct; and also that they, the said trustees, would permit the said two youngest children, if they so desired, and without any interference on the part of the said *E. Gandy*, to accept any invitation which the said *M. Gandy* might from time to time give them to reside with him.

There were four daughters, two adult at the date of the deed and two infants. The Plaintiff was the elder of the two youngest daughters and at the date of the deed she was in her fourteenth year.

On the 30th of July, 1881, the Probate and Divorce Division granted a decree for the judicial separation of Mr. and Mrs. *Gandy*, giving Mrs. *Gandy* the custody of the two youngest children until further order.

After the decree Mrs. *Gandy* applied for an order that her husband's means should be ascertained by the Registrar, for the purpose of fixing her permanent alimony, and the President decided that the Court could give alimony according to its ordinary principles, the husband having by his subsequent adultery lost his right to enforce the stipulation that the wife should not sue for further alimony: 7 P. D. 77. This decision was reversed by the Court of Appeal on the 18th of April, 1882, 7 P. D. 168, both the arguments and the judgments proceeding on the footing that the husband continued liable under his covenant to pay the expenses of the maintenance and education of the two youngest children.

In April, 1882, Mr. *Gandy* expressed his intention of no longer providing for the maintenance and education of the Plaintiff, who had attained sixteen years of age in November, 1881, whereupon Mrs. *Gandy* presented a petition in the Probate and Divorce Division that her husband might be ordered to pay her a proper sum for the maintenance and education of the two youngest children. The President, however, considered that he had no jurisdiction to make the order asked for, and suggested that the Plaintiff's proper remedy was to endeavour to enforce her father's covenant in the separation deed. The Plaintiff's solicitors then

wrote to the trustees of the deed informing them of the Plaintiff's intention to commence preceedings in the Chancery Division against Mr. *Gandy* to enforce his covenant, and inviting them to co-operate with her as Plaintiffs, but they both refused to be joined as Plaintiffs, or to take any active steps whatever in the proposed litigation. The Plaintiff thereupon instituted this action, by one of her adult sisters as her next friend, against her father and the trustees, claiming (1) a declaration that the Defendant *M. Gandy* was, upon the construction of the separation deed, liable to pay to the trustees on behalf of the Plaintiff all the expenses connected with her maintenance, and an order for payment accordingly; (2), execution of the trusts of the deed; and (3), an inquiry as to the amount expended by Mrs. *Gandy* for the Plaintiff's maintenance from the date of her attaining sixteen years of age up to the present time.

The Defendant *M. Gandy* delivered a statement of defence, in which he denied having refused to maintain the Plaintiff. The Defendants, the trustees, delivered no defence, and did not appear on the trial. The action came on for trial before Vice-Chancellor *Bacon* on the 15th of May, 1884, when the case was argued principally upon the construction of the deed and upon the question as to whether the Defendant, *M. Gandy*, was under any legal liability to maintain his daughter, the Plaintiff, she having attained the age of sixteen. During the argument, however, the counsel for the Defendant, *M. Gandy*, raised an objection which had not been raised by his statement of defence, namely, that the Plaintiff was not competent to sue upon the separation deed, and that the only proper parties to sue were the trustees.

Hemming, Q.C., and *R. Gaskell*, for the Plaintiff.

Marten, Q.C., and *Ingle Joyce*, for the Defendant:—

The children are not parties to the deed, nor did the consideration for the deed move from them.

Where one party to a deed contracts with another party to pay to a third person not a party, that third person, not being a party to the contract, cannot enforce it: *Tweddle* v. *Atkinson* (1); *In re Empress Engineering Company* (2).

(1) 1 B. & S. 393. (2) 16 Ch. D. 125.

C. A. BACON, V.C.:—

1885

GANDY v. GANDY.

I need not trouble you, Mr. *Hemming*. A question has been raised in this case that is most extraordinary in itself, and more extraordinary still is the argument I have heard in support of the defence to this claim. Here a covenant for perfectly valuable consideration is entered into with trustees for the present Plaintiff. The trustees refuse to sue; and then I am told it has been decided at common law that an agreement between *A.* and *B.* to pay a sum of money to *C.* is one which will not maintain an action by *C.* That may be very good in law—in a Court of common law—but it is very new to me to hear that the *cestui que trust* if the trustee refuses to do his duty cannot ask for the relief to which he would be entitled if the trustee did his duty.

Upon the merits of the case his Lordship held that the Defendant *M. Gandy* was liable under his covenant to pay the expenses of the maintenance of the infant plaintiff, whether past or future, and directed the following inquiries:—(1) what sum was proper to be allowed for the future maintenance of the infant Plaintiff; and (2), what sum had been expended for past maintenance, and by whom. The Defendant *M. Gandy* was ordered to pay the costs of the action, and further consideration was adjourned.

C. A. From this judgment the Defendant *M. Gandy* appealed. The appeal was heard on the 5th of June, 1885.

Subsequently to the service of the notice of appeal the Chief Clerk made his certificate in answer to the inquiries, and by an order made on further consideration the Defendant was ordered to pay to Mrs. *Gandy* the sums mentioned in the certificate.

Marten, Q.C., *Davey*, Q.C., and *Ingle Joyce*, for the appellant, Mr. *Gandy*:—

We submit that the action cannot be maintained by the present Plaintiff. It is the case of a child suing on a deed to which that child is not a party. The trustees are the proper parties to sue.

[COTTON, L.J.:—Is not this child a party beneficially interested under the deed? It has always been held that parties beneficially interested under a settlement may sue on covenants contained in it: should not this apply equally to a separation deed?]

This case differs from that of a marriage settlement. In a settlement there are direct trusts declared for the children, who are therefore constituted *cestuis que trust.* Here there are no such trusts, and the child is not within the consideration of the deed at all. A mere stranger to the consideration cannot enforce performance of the contract, even though he is avowedly intended to be benefited thereby: *Tweddle* v. *Atkinson* (1). This deed is purely an arrangement between the husband and wife, and one with which the children had nothing to do. The utmost that can be said of this covenant is, that it is a contract between two parties, the husband and the trustees, that one of them, the husband, shall pay a sum of money to a third person, the daughter, not a party to the contract; in other words, it is an agreement between *A.* and *B.* that *B.* shall pay *C.*, not a party: but that is not sufficient to make that third person, *C.*, a *cestui que trust*, and so entitled to sue as such: *In re Empress Engineering Company* (2). There must be some direct contract between plaintiff and defendant to give the former a right of action: *Dickson* v. *Reuter's Telegraph Company* (3). Here the trustees are trustees for the wife only, and the husband and wife can put an end to the deed at any time. As to the covenant for the maintenance of the infant children, the trustees have a discretion with which the Court will not interfere.

[COTTON, L.J.:—The whole deed is contingent upon the husband and wife living separate. Could they put an end to the deed while living separate?]

Yes: they might say "we are not satisfied with this deed; we will have another." The actual parties to the deed are masters of the situation, and there is neither a permanent nor a temporary trust for a third person. Consequently, there being no trust for this Plaintiff, she is not entitled to sue.

Hemming, Q.C., and *R. Gaskell*, for the Respondent, the Plaintiff:—

The Plaintiff has a direct interest under this deed, and, therefore, as it is clear from the correspondence that the trustees will

(1) 1 B. & S. 393, 398. (2) 16 Ch. D. 125.
(3) 2 C. P. D. 62.

C. A. 1885 GANDY v. GANDY.

not enforce the covenants, the Plaintiff, as *cestui que trust*, is entitled to do so. Even if the children have not a direct interest as *cestuis que trust*, they are *cestuis que trust* by inference, just as, in the case of a covenant on a second marriage for the benefit of the children by a former marriage, those children are in the position of *cestuis que trust* and can enforce the covenant as such, that case being an exception to the general rule that the performance of a covenant cannot be enforced by volunteers: *Gale* v. *Gale* (1). There seems to be no valid reason why the same considerations should not apply to a separation deed which provides for the maintenance not only of the wife, but of the children also.

[BOWEN, L.J.:—The passage towards the end of the judgment is against you, where Lord Justice *Fry* says (2): "As *Jefferys* v. *Jefferys* (3) shews, if a similar settlement is executed, but not upon a marriage, the Court will not enforce it in favour of the children as volunteers."]

In *Jefferys* v. *Jefferys* the settlement was incomplete, and so it was in *Ellis* v. *Nimmo* (4), which was a decision the other way, and I submit the better decision. The principle, no doubt, is that an incomplete settlement shall not be enforced in favour of volunteers; but this is not an incomplete settlement. When one man covenants with a trustee to pay him money for a third person, the test for deciding whether or not that third person is a *cestui que trust* is, as stated in *In re Empress Engineering Company* (5), whether the covenantee and the covenantor can together put an end to the contract. This deed has already been treated as a binding obligation on the husband to maintain his wife and children: *Gandy* v. *Gandy* (6). If the wife can compel the trustees to enforce the covenant, so can the children who derive their only means of support under it. We submit that it is clear from the whole of the provisions of the deed that the children are just as much interested in the deed as the wife. A distinction should be drawn between a covenant by *A.* with *B.* to pay *C.*, and a covenant by *A.* with *B.* to pay *B.* a sum of money to be held by

(1) 6 Ch. D. 144.
(2) Ibid. 152.
(3) Cr. & Ph. 138.
(4) Lloyd & Goold, temp. Sugden, 333.
(5) 16 Ch. D. 125, 129.
(6) 7 P. D. 77, 168.

B. in trust for or for the benefit of *C.* In the former case, there being an imperfectly created trust, *B.* is the right person to sue; but in the latter case, *C.* may sue, the trust being clear, if *B.*, the trustee, refuses. In the present case the children cannot be put in any other position than that of *cestuis que trust*, unless the trustees are entitled to say: "When we have received the money we can deal with it as we like." Very little will suffice to create the relation of trustee and *cestui que trust.* For instance, in *Tomlinson* v. *Gill* (1), a promise by the defendant with the widow of an intestate to make good any deficiency in the assets, was held to make the defendant a trustee for the creditors; and in *Touche* v. *Metropolitan Railway Warehousing Company* (2) it was held by Lord Chancellor *Hatherley* that an agreement or arrangement between the plaintiff and a promoter of the defendant company, that he, the plaintiff, should receive £2000 out of the moneys of the company, entitled the plaintiff as *cestui que trust* to sue the company.

[BOWEN, L.J.:—The latter case seems inconsistent with *Eley* v. *Positive Government Security Life Assurance Company* (3).]

Express declaration is not necessary to create the relation of trustee and *cestui que trust* between *A.* and *B.*: the question is simply whether what is to be done by *A.* is for the benefit of *B.* or someone else. Here the trustees do not say that they are not trustees for the children, but merely that they will not act.

Upon the whole we submit that the present Plaintiff is entitled to sue; but, if the Court should be of a contrary opinion, we ask that we may be allowed to use the names of the trustees as Plaintiffs.

[COTTON, L.J.:—If this objection prevails, what should be done, Mr. *Marten*?]

Marten:—I submit the action should be dismissed with costs.

[COTTON, L.J.:—If there has been a mistake in law in not making the trustees Plaintiffs, should not the Court under Rules of Supreme Court, 1883, Order XVI. r. 2, direct an amendment so as to make the proper persons Plaintiffs?]

(1) 1 Amb. 330. (2) Law Rep. 6 Ch. 671.
(3) 1 Ex. D. 88.

C. A. 1885 GANDY v. GANDY.

Marten:—I submit that rule is not applicable to the present case. It only applies to cases where, for instance, two parties are interested in the subject matter, and the question is which of them should be plaintiff. But here, if the Plaintiff cannot sue on the footing of a trust, she cannot sue at all, not having any interest in the subject-matter. The mistake here is not a mere oversight, but a mistake in substance; therefore the action should not stand over for amendment, and we are, I submit, entitled to immediate judgment.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, who, on the action coming on for trial, decided the question as to the liability of the husband under this covenant, and overruled the objection which was taken before him, and has now been taken before us, that the child who is now suing is not a person who ought to sue and enforce this covenant. Although, perhaps, a Judge ought not to regret any decision which he is called upon to give, I must say I do regret that such an objection should have been taken in this case, and that we are bound to hold that the objection is a good one, for our decision will probably lead to further litigation, when all the matters in dispute between the parties might now have been settled.

The objection is this. Under a deed of separation between husband and wife, there were, as is usual, trustees with whom the husband entered into covenants and who entered into covenants with the husband. One of the covenants by the husband, being the covenant which the Plaintiff is now seeking to enforce, was to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters, of whom the Plaintiff is one; and the objection is that the trustees are the only persons to sue on that covenant, or, at any rate, that the present Plaintiff is not a person who can sue upon that covenant, it having been entered into, not with her, but with two other persons, namely, the trustees, who are Defendants.

Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a

breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with *A.*, is intended to secure a benefit to *B.*, so that *B.* is entitled to say he has a beneficial right as *cestui que trust* under that contract; then *B.* would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated. The general rule is undisputed, but the question is whether this case is within any of the exceptions to that rule.

Of the cases that have been referred to, I will notice the last mentioned by Mr. *Hemming*, that of *Touche* v. *Metropolitan Railway Warehousing Company* (1), where there was an arrangement between a promoter of a company and another person that a certain sum should be paid out of the funds of the company to that other person; the company seems to have admitted the arrangement, and in the articles there was a contract or stipulation that the money should be paid to the promoter, in order that the arrangement might be carried out. There Lord *Hatherley* held that the other person who was to get the money was entitled to sue under that contract. What Lord *Hatherley* says is this (2):—"The case comes within the authority that, where a sum is payable by *A. B.* for the benefit of *C. D.*, *C. D.* can claim under the contract as if it had been made with himself. It is possible that *Walker* may, as he states in his answer, not be under any personal liability to the plaintiffs; but I think that, on the evidence, the plaintiffs were to be paid when *Walker* got the money, and they knew that by the articles of the company he was to be paid." Now, if that is intended to lay down the rule as a general proposition of law in the general terms there used, it is not consistent with the other case referred to, *In re Empress Engineering Company* (3); but it may be that on the facts of the former case it was considered that the contract between *Walker* and the company was entered into by *Walker* as a trustee for and on behalf of the plaintiffs: and, if so, that is in accordance with what I understand to be the law. But the late Master of the

(1) Law Rep. 6 Ch. 671. (2) Law Rep. 6 Ch. 677.
(3) 16 Ch. D. 125.

C. A. 1885 GANDY v. GANDY. Cotton, L.J.

Rolls, in *In re Empress Engineering Company* (1), dealing with *Touche's Case* (2), said this in the course of the argument (3) :—"In that case the Lord Chancellor finds, as a fact, that *Walker* was to receive the money as a trustee for the plaintiffs. If you can make out that *Jones* and *Pride* are *cestuis que trust*, that alters the case. It appears to me that they are not. The promoters were liable to *Jones* and *Pride*, who are simply their creditors. *A.* being liable to *B.*, *C.* agrees with *A.* to pay *B.* That does not make *B.* a *cestui que trust*." This shews that the general terms used by Lord *Hatherley* must be taken with some qualification as laying down the general law.

I think what we have to consider is this—whether these two trustees, who are Defendants, did enter into this contract so as to give to these infant children a beneficial right to the consequences of the covenant being performed. In my opinion that was not so. This was a separation deed. The two parties whose rights had to be provided for were the husband and wife. I am not at all of opinion that these trustees, so far as there are stipulations for settling the relation of husband and wife, and providing for the rights and liabilities of each, could alter those stipulations without the consent of the wife, or, if the adult children are persons who are to be considered as having the covenants entered into with trustees on their behalf, without their being considered. I give no opinion as to the adult children. In my opinion the covenantees, the trustees, could not, as regards the covenants entered into with relation to the rights of the wife and her position, alter that contract without her consent. She was a person for whose benefit those covenants were entered into, in this sense—that they were intended to give her beneficial rights which she would not have had without those covenants. But, in my opinion, this covenant, as regards the children, was not to give them any benefit by way of right—any beneficial right—but simply to provide as to what was to be done by the husband on this separation and on this contract between himself and his wife.

In my opinion, therefore, the objection is a fatal one; but it was not taken by the defence. It was first raised at the trial in the Court below. That being so, although we think that the

(1) 16 Ch. D. 125. (2) Law Rep. 6 Ch. 671.
(3) 16 Ch. D. 127.

objection is fatal to the action in its present form, yet, as the Plaintiff desires it, I think the action ought to stand over in order that the Plaintiff may see whether she can induce the trustees, or one of them, to allow their names to be used as Plaintiffs. They cannot be compelled to sue; but they may be willing, when they know that the covenant cannot be enforced without their being Plaintiffs, to allow their names to be used, on receiving a proper indemnity. I am satisfied that there has been a *bonâ fide* mistake as regards the law in framing the action as if this infant child could in her own right enforce this covenant. In my opinion, the proper course to enable the question of the real liability of the husband under this covenant to be settled, is to allow this appeal to stand over that the Plaintiff may take such course as she may be advised to amend the record by having the covenantees, or one of them, made parties to the action as Plaintiffs.

BOWEN, L.J.:—

I am of the same opinion, and I should add nothing if it were not that we are overruling a decision of a Judge of first instance. I will add but very few words. At law the rule in general is, no doubt, that a contract between two parties that one should do something for the benefit of a stranger, cannot be enforced by the stranger, except in certain exceptional cases. It was supposed at one time in the history of our common law, that there was an exceptional class of cases, in which where a contract was made for the benefit of a person who was not a contracting party, that is to say, a stranger, it could be enforced by that person at law. It would be mere pedantry now to go through the history of that idea: it is sufficient to say that in the case of *Tweddle* v. *Atkinson* (1), to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine,

(1) 1 B. & S. 393.

C. A. 1885 GANDY v. GANDY. Bowen, L.J.

and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right.

For the reasons which were pointed out by Lord Justice *Cotton*, and with which I fully agree, it seems to me, on the true construction of the deed, that it does nothing of the sort, and that therefore the children cannot themselves sue. Under all the circumstances of the case, it seems to me to be one in which the Court is well advised in allowing an amendment of the writ, and so giving those who are charged under this deed with the duty of protecting the interests of the children a *locus pœnitentiæ* and opportunity, if they can, of making out a case for the intervention of the Court on behalf of those children.

FRY, L.J.:—

I am of the same opinion. The substantial question in this case is whether or no the trustees, under the deed of the 26th of June, 1879, are trustees of the covenant in question for the daughter, who is Plaintiff in this action?

To answer that inquiry, one must look at the whole of the instrument. It appears that Mr. *Gandy* covenanted with his trustees, in the first place, for the payment of a sum of £252 a year for the use of his wife and her daughters, other than the two youngest; and then he covenanted also to pay to the trustees all the expenses connected with the maintenance and education of the two youngest daughters. But that was subject to these two provisoes:—Provided that the trustees permitted his daughters to go to such schools as he, the husband, should from time to time direct; and provided also that the covenants therein contained on the part of the trustees were duly performed and observed.

Now there are several covenants on the part of the trustees; and one of them is, that the trustees will permit the two youngest children, if they so desire, and without any interference on the part of the mother, to accept any invitation which the husband may from time to time give them to reside with him. It is impossible to read this instrument and not come to the conclusion

that the trustees were entrusted with a considerable authority over the two youngest children. These children were not to reside with the mother. The costs and expenses of their maintenance were to be paid by the husband to the trustees; and in the covenant to indemnify him, the husband, against the debts of the wife, the expenses connected with the maintenance and education of the two youngest children are excepted.

It appears to me, therefore, that the trustees were placed in a position of some responsibility with regard to these two youngest children; and if they had responsibility, they would also have some discretion; and I am not able to conclude that they could be compelled to send those children to the school which might be indicated by Mr. *Gandy*, or that they could be compelled to allow those children to accept the invitation of the father, supposing that they in their judgment concluded that those acts were inconsistent with the welfare of the children. It is not necessary to decide that point absolutely; but it is obvious that the covenant is not a simple covenant to pay a sum of money for the benefit of those children, but is a covenant contingent upon the observance of many things by the trustees. I only refer to those points in order to shew that I have been looking at the entire deed to consider whether the trustees are simply trustees for the benefit of these children under this covenant, so that the covenant may be enforced by the children themselves, or whether it is a covenant which must be enforced by the trustees, if enforced at all; and I come to the conclusion that the covenant is of the latter description—that it is a covenant in respect of which the trustees probably have some discretion, and of which it is impossible to say that they are simply trustees for the Plaintiff and her sister.

Taking that view, it appears to me that it is impossible for the present action to succeed in its present form; but I agree that liberty to amend should be given, and I think it should extend, not merely to an amendment by adding the present Defendants, the trustees, as Plaintiffs, but, if the Plaintiff should be so advised and the mother be so willing, by adding the name of the mother as well.

THEIR LORDSHIPS then made an order directing the further

C. A. 1885 GANDY v. GANDY.

hearing of the appeal to stand over for three weeks with liberty for the Plaintiff to amend the writ, by adding as Plaintiffs the other sisters, the wife, and the trustees, or any of those persons, on the necessary consent being obtained: liberty to apply for extension of the time for amendment: all proceedings on the order on further consideration to be stayed until further order: the costs of the present appeal to be reserved.

G. I. F. C.

The trustees refused to be made co-Plaintiffs. The statement of claim was amended by joining Mrs. *Gandy* and her two eldest daughters as co-Plaintiffs, and the appeal was placed again in the paper on the 13th of July.

Marten, Q.C., *Davey*, Q.C., and *Ingle Joyce*, for *M. Gandy*:—

The objection which prevailed at the last hearing is not removed. The eldest daughters have no better right to sue than the original Plaintiff. Then, can Mrs. *Gandy* sue? The right of action is vested in the trustees, and the duty is imposed on the trustees of seeing to the control of the youngest daughters. The wife is not the *cestui que trust* of the covenant; the covenant is with the trustees to do something for the benefit of the youngest daughters, subject to the trustees seeing to certain things being done, and, if they are not done, the liability under the covenant does not arise. The Court on the last occasion must be held to have decided that the trustees were the only persons who could sue. It may be said that this is a contract between husband and wife; but the contract was that the husband should enter into a certain covenant with the trustees, and, he having done so, his contract with the wife has been performed, and the Court can only look to the terms of the covenant.

[COTTON, L.J.:—Do you say that if the trustees will not sue there is no remedy?]

The remedy would be to institute a suit for the execution of the trusts of the deed. If the trustees refused to do their duty the Court could in such a suit remove them and appoint others in their room. The wife has no pecuniary interest in this covenant, and therefore has no right to sue.

Hemming, Q.C., and *R. Gaskell*, for the Plaintiffs, were not called upon as to the preliminary objection.

COTTON, L.J.:—

The statement of claim has now been amended by adding as co-Plaintiffs the adult sisters and Mrs. *Gandy*. I think that the case is not helped by the addition of the adult children, but the question is whether the wife has not such an interest as entitles her to sue. Our former judgments were relied upon, especially what was said by Lord Justice *Fry*, as to the trustees being the persons to sue; but it is evident that these expressions were not intended to conclude the question whether the trustees were the only persons who could sue, for all the members of the Court concurred in giving leave to amend by adding the other sisters, the wife, and the trustees, or any of them. I am of opinion that the wife is entitled to sue. The separation deed was a deed intended to regulate the future relations between the husband and wife, and though the covenant now in question does not give any direct pecuniary benefit to the wife, yet it is a part of the bargain entered into on the separation, and the deed is a deed in every part of which the husband is interested on the one side and the wife on the other. By this deed the husband and wife agree to live separately, the husband giving up certain rights of property, and entering into certain engagements to provide for his wife and daughters. Mr. *Davey* says the covenant is only by the husband with the trustees, and that he is not liable to be sued by anyone else. If a covenant had been entered into with them that if they at their discretion required him to do certain things he would do them, that might have been so; but here, I think that trustees were put in merely to enable an action to be brought at law, and to get over the difficulty that the wife could not enter into a covenant with her husband on which an action could be brought, nor the husband enter into a covenant with the wife on which she could sue him at law. Though trustees are introduced, I think that the deed is in substance an agreement between the husband and wife, the trustees being introduced only as representing her. It is said that a number of things are to be done by the trustees. If the deed had contained stipulations that

C. A. 1885 GANDY v. GANDY. Cotton, L.J.

they should do certain things, and these things were not done, that might be an answer to an action by whomsoever brought, but that is quite a distinct question from the question whether the trustees are not put in only to represent the wife, and whether she cannot sue if they refuse to do so. I am of opinion that the covenant is entered into with the trustees, as representing her, and that the case comes within the authority of the decisions referred to when it was last before us, which lay down that where a covenant is entered into with one person for the benefit of another, then, if the covenantee will not sue, the person beneficially interested may sue in equity. The preliminary objection that there is no plaintiff with a right to sue must, therefore, be overruled, and we must hear the appeal on the merits.

LINDLEY, L.J.:—

I also am of opinion that this action can be maintained. These trustees must be trustees for somebody; for whom, then, are they trustees? The Court decided on the last occasion that they were not trustees for the infant children, so as to enable those children to sue. Then for whom are they trustees? It was not expressly decided on the last occasion that they were trustees for the wife, but that principle underlies the judgments.

BOWEN, L.J.:—

I am of the same opinion. The object of this deed was to settle the relations between the husband and the wife, it was a bargain between the husband and wife, and it would be monstrous that the wife should be without remedy if the trustees refuse to enforce its provisions. I do not say that even in a deed of this kind there might not be covenants in which the wife would not be interested, and on which, therefore, she could not sue; but the general object of the stipulations on the part of the husband is her benefit, and *primâ facie* she is entitled to enforce them if the trustees will not. If there were discretionary authorities given to the trustees that would cause a difficulty, but even then she would be a party interested in the covenant. Here, the object of having trustees was to provide a machinery

for enabling the stipulations to be more readily enforced, not to prevent the wife from having an interest in them. A covenant for the maintenance of a woman's children is one in which she has an interest, and I am of opinion that as the trustees refuse to enforce it, she is entitled to sue.

The case then proceeded on the merits.

Marten, Q.C., *Davey*, Q.C., and *Ingle Joyce*, for the Appellant:—

The covenant is put an end to, or at least suspended, by Mrs. *Gandy's* taking the custody of the two youngest children. The deed contains provisions that the wife shall not have the custody of the youngest children, and that they shall reside where the father chooses, and the covenant to pay is made conditional on the observance of the covenants by the trustees, one of which is that they will carry out his directions as to the school at which the daughters shall be educated and the places where they shall live. The covenant is conditional on the husband having the custody of the children, and Mrs. *Gandy* cannot both approbate and reprobate.

[COTTON, L.J.:—This objection, that the covenant has come to an end, was not taken before the Court of Appeal when the decision of the President was reversed, which was after the order giving the custody of the children to Mrs. *Gandy* had been made. If it had been shewn on that occasion that the covenant was no longer in force, the decision probably would not have been the same.]

The covenant must be read as a covenant to pay for the maintenance and education of these children so long as Mrs. *Gandy* is not entitled to the custody of them. The decision of the Court of Appeal (1) proceeds on the ground that there is no jurisdiction to alter the provisions of the deed. The wife, therefore, is still bound by it.

Hemming, Q.C., and *R. Gaskell*, *contrà*:—

The covenant is to pay to the trustees provided they allow the children to go to such school as the father chooses, and they have

(1) 7 P. D. 168.

C. A. 1885 GANDY v. GANDY.

done so. No breach of the covenants by the trustees is shewn. The Appellant relies on the provision that Mrs. *Gandy* is not to have the custody of the children, but looking at the covenants together, the meaning is that the trustees are not to take the children and place them where the father does not approve. There is nothing that amounts to giving the custody of them to him. The Court, on the appeal from the Divorce Court, held that as the Court could not diminish the amount of alimony provided by the deed, it was not right that it should enlarge it. It was held there that the father was liable on this covenant, and we ask the Court to hold the same now. We cannot ask the Court to say that the construction of the deed is different from what it was considered to be on the former occasion, but if the Appellant succeeds in that contention, we ask the Court to say that the husband has so far repudiated the separation deed that he cannot now claim any benefit from it, and that under the altered circumstances the wife should be allowed to claim alimony before the Divorce Court.

[BOWEN, L.J., referred to *Whieldon* v. *Whieldon* (1) as shewing that the maintenance of the children would be taken into account in allotting alimony.

COTTON, L.J.:—How far do you go in your claim for maintenance? Can you go beyond minority?]

We do not ask the Court to decide at present how long maintenance is to last. In *De Crespigny* v. *De Crespigny* (2) and *Carr* v. *Living* (3), it was extended beyond minority, but we do not say that the Vice-Chancellor intended to decide this point, and it is not necessary to do so now, when the elder of the two girls is still a minor.

Davey, in reply:—

We do not admit that the covenants on the part of the trustees have been kept: the girls are not living at a place which the father approves.

[COTTON, L.J.:—It is to be a place "reasonable and proper for the purpose."]

(1) 2 Sw. & Tr. 388. (2) 9 Ex. 192. (3) 33 Beav. 474.

Suppose he wished them to live with an unexceptionable female relative, that would be against the decree which gives the custody of them to the mother.

[COTTON, L.J.:—Does the proviso limit the time of payment? It does not do so in terms.]

Yes; the covenant is to pay provided the education is carried on under his reasonable directions, and the residence is where he reasonably directs.

[BOWEN, L.J.:—You obtained a decision of the Court of Appeal in your favour on a particular view of the construction of the deed, in which view you then acquiesced. Can you now turn round and say that view was wrong?]

That is to say, that I am estopped from saying that I am not estopped by matter of record. If it can be shewn that the *ratio decidendi* of the Court was a particular construction of the deed, then I am estopped by matter of record, but there must be estoppel by *res judicata*, or there is no estoppel at all. The Court did not decide on any particular construction of the deed, but on the ground that the Court had no jurisdiction in a suit for judicial separation to alter a separation deed, and that effect must be given to the deed unless one of the parties had been guilty of such misconduct as to become disentitled to enforce it.

July 14. COTTON, L.J.:—

This is an appeal by the Defendant against a judgment of Vice-Chancellor *Bacon*, whereby he declared that under a deed of separation executed in 1879 the Defendant was liable to provide for the expense of the maintenance and education of the two infant children of his wife, Mrs. *Gandy*. We have already disposed of a preliminary objection that Mrs. *Gandy* has no title to sue in order to enforce the particular covenant in question.

It having thus been decided that Mrs. *Gandy* had an interest enabling her to sue upon this covenant when the trustees refused to do so, the Defendant then raises this point; he says that the agreement to provide for the maintenance and education of the two youngest children was subject to a condition, not only that the children should be allowed by the trustees to reside at such

C. A. 1885 GANDY v. GANDY. Cotton, L.J.

school as he desired, but that Mrs. *Gandy* should not have the custody of them, and that they should live at the places pointed out by the Defendant, the father, and should be at liberty to reside with him. He says that this condition has been broken, and that therefore there is an end, or at least a suspension, of his liability under this covenant. We must consider whether that contention can prevail, and also consider what is right to be done, having regard to a previous case between the same persons, where the Divorce Court, having been applied to to grant alimony to the wife, and in substance having granted it, there was an appeal to this Court by Mr. *Gandy*, who contended that she was bound by the provisions of the deed, and could not have any alimony beyond what the deed provided for her. In that case, the sole question raised before the Divorce Court was this, that the subsequent adultery of the husband had put an end to the deed, there being an implied condition that the husband and wife should live a chaste life. Sir *James Hannen* decided that there was such an implied condition, but the Court of Appeal did not agree with that. There was also another point raised here on that appeal: it was argued on behalf of Mrs. *Gandy* that there was an additional burden thrown upon her, because the order which had directed a judicial separation had given her the custody of the children. The argument on behalf of the Appellant on the present occasion is that the fact of obtaining that order is a breach of the condition, and suspends or puts an end to his covenant to provide for these children; that although it was not expressed in terms that his liability was only to last so long as he had the custody, yet that this was a condition imposed by the proviso, and that Mrs. *Gandy's* obtaining that order for the custody of the children put an end to the provision for these children. The Court of Appeal in deciding the appeal from the Probate and Divorce Division went upon two grounds. They said that the adultery of the husband was not against an implied condition in the deed, and that the deed was not therefore at an end. But then they considered the question whether, assuming the deed not to be at an end, there was a ground for increased maintenance, and in answer to the point raised by the counsel for Mrs. *Gandy*, they said that no greater burden had been thrown on

her by the order that she should have the custody of the children, for that there was still standing the provision in the deed by which the husband is to provide for the expense of their maintenance and education. Whether it was then contended by Mr. *Gandy's* counsel that that was the true construction and effect of the deed, I do not now recollect, but certainly the judgment in his favour was based on this, that, if the deed stood, there was no ground, from alteration of circumstances, for any addition by way of alimony to the provision made by the deed for Mrs. *Gandy* and her two elder children. There are passages in the judgment of the late Master of the Rolls, and in the judgment which I delivered, which shew clearly that this was the view which we then took of the deed, the husband not then contending that the order which had been made giving the custody of the children to the wife had released him from the covenant. It was part of our *ratio decidendi* when we refused further alimony to Mrs. *Gandy*, that in our opinion the deed was not put an end to, and that the circumstances were not so altered that, the deed standing, she ought to have an increase of alimony, the provision then made for her being £252 plus the provision for the maintenance of the younger children, and no further burden being thrown upon her.

Mr. *Gandy* now comes here and contends that his covenant to pay the expenses of the maintenance and education of the two youngest children is at an end, or at least suspended, and that the only provision which can now be enforced against him on behalf of Mrs. *Gandy* is to pay the £252 a year. If that be the true construction of the deed, then in my opinion the Court ought not to be bound not to grant alimony beyond the provision made for the wife and her two elder children, for that is not the whole of the provision made for her. In fixing the amount of alimony to a wife, the Court (as in the case referred to by Lord Justice *Bowen*) considers, and in my opinion ought to consider, not only what provision should be made for her, but what provision should be made for the maintenance of those children of whom the Court has said she is to have the custody and control.

What, then, ought we to do under the circumstances? The

C. A. 1885 GANDY v. GANDY. Cotton, L.J.

decision on the appeal from Sir *James Hannen* was in favour of Mr. *Gandy*, on the ground that this was a continuing provision for the maintenance of the children. He contends now that this is not the true construction and effect of the deed. It would be wrong in my opinion to allow him to take advantage of a decision given on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that that was not the true construction. It has been suggested that we ought not to listen to such arguments. Mr. *Davey* says, and that seems to me to be so, that we really gave no judgment as to the construction of the deed in the former case, though our opinion was expressed, and one particular construction of the deed was one of the grounds on which we decided that case. Ought we, therefore, there being no positive decision, to say we are bound? I feel a difficulty about that, but I feel a greater difficulty in giving a judgment in the husband's favour on the present occasion, while that former decision stands. In my opinion the proper course will be not to dispose of this appeal for the present, but, having regard to our opinion, which I have expressed, of what must be considered in fixing the proper amount of alimony, to allow Mrs. *Gandy* to make a fresh application to the Divorce Court for increased alimony, that is to say, alimony other than the £252 covenanted to be paid by the husband to the trustees for her and the elder children, and in the meantime to stay all proceedings under the judgment which is appealed against. I do not think that we ought to dispose of this question of construction until the result of that application is known, we shall then have the whole matter before us, and shall be able to do what is right. It may be that Sir *James Hannen* or the Judge before whom it comes may feel a difficulty in granting any increased alimony while Vice-Chancellor *Bacon's* judgment stands, but after the expression of my opinion, which I believe is concurred in by the other members of the Court, I should think that he would not feel that difficulty. If Mrs. *Gandy* does not obtain an order for increased alimony she can appeal to this Court, we then shall have the two appeals before us, her appeal and this present appeal, and can dispose of both of them. If she obtains an order from the Divorce Court for increased

alimony, Mr. *Gandy*, if dissatisfied with it, may appeal, and when that appeal comes before us with the present appeal we shall know how to deal with the matters so as to do justice between the parties.

LINDLEY, L.J. :—

I am of the same opinion, and I will only add that having been a party to the previous decision, I can venture to say that no member of the Court ever dreamed of deciding that Mrs. *Gandy* was only entitled to £252, if she had to maintain the two younger children. We may have said something which looks like it, but nothing was further from our intention. What was decided was this, that the continuing adultery of the husband did not discharge the wife from the obligation to accept the provisions made by the deed in satisfaction of all her claims. The reported expressions of the different members of the Court, shew plainly enough that they assumed that the husband would maintain the two younger children, and on that assumption they said that the wife could not claim more than the £252.

BOWEN, L.J. :—

I am of the same opinion. It seems to me that the decision in *Gandy* v. *Gandy* (1) proceeded on two grounds. The first was, that the adultery of the husband was not a breach of any implied condition in the deed, and the second was, that that being so, the adultery of the husband was not *per se* a sufficient reason for allowing the wife to apply for increased alimony, no increased burden being thrown on her. In order to arrive at the second ground, which is vital, I think, to the decision, it was taken for granted, with the acquiescence of Mr. *Gandy* by his counsel, that Mr. *Gandy* still acknowledged a continued liability to bear the expense of the maintenance and education of the two youngest children. If it had been otherwise, and if it had appeared that there was no such continuing liability, it seems to me that the case must have been otherwise decided, because the Court ought, and would feel that it ought, to have regard to the whole circumstances

(1) 7 P. D. 168.

C. A. 1885 GANDY v. GANDY. Bowen, L.J.

of the case, in deciding whether the wife might apply for increased alimony or not, and ought to consider what the liability of the husband was, and what the burdens imposed on the wife were in respect of her children as well as other matters.

The husband having got the benefit of our decision on the appeal from the Divorce Court, on the ground that he was acknowledging his continued liability to pay for the maintenance of the two youngest children, now turns round and declines to contribute to their maintenance and education. I am not quite sure (and I reserve the point for further consideration) that the decision of the Court on that appeal did not involve a judicial construction of the covenant which, whether it was right or wrong, would be binding upon the parties. I am not certain that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject-matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the Court allowed that. It is clear, at all events to my mind, that unless the construction which was suggested and adopted on the appeal from the Divorce Court is to be treated as binding, the conduct of the husband, and the decree of the Divorce Court which changed the custody of the children from husband to wife, have imposed on the wife a burden and duty which render the alimony inadequate, unless the husband was to pay for the maintenance and education of the two children.

It seems to me, therefore, that the order which Lord Justice *Cotton* has suggested is the right one, viz., to stay proceedings under the judgment of Vice-Chancellor *Bacon*, in order that the wife may apply, if she is so advised, to the President of the Divorce Court for increased alimony, with liberty to bring this appeal on again if it is necessary. The Lords Justices agree with me in thinking that the proper form of order will be this:—It now appearing that the husband declines to contribute to the

maintenance and education of the two youngest children, stay the proceedings under the judgment of Vice-Chancellor *Bacon* till further order, with liberty to the wife, if she is so advised, to present a fresh petition to the Divorce Court for increased alimony, with liberty to either side to apply to restore this appeal to the paper.

Solicitors: *Gregory, Rowcliffes & Co.*, agents for *Stone, Fletcher & Hull, Liverpool; W. & A. Ranken Ford.*

H. C. J.

V.-C. B.
1885
June 18.

BAILEY *v.* BADHAM.

[1883 B. 6555.]

Tithe Rent-charge—Arrears not recoverable by Sale—Tithes Commutation Act (6 & 7 Will. 4, c. 71), s. 67—[Revised Ed. Statutes, vol. vii., p. 1089].

By the 67th section of the *Tithes Commutation Act* (6 & 7 Will. 4, c. 71) the sum thenceforth payable in lieu of tithes is declared to be "in the nature of a rent-charge issuing out of the lands charged therewith."

Lands in respect of which a tithe rent-charge was payable having become unproductive, and the remedy by distress and entry having become ineffectual:—

Held, that the sum payable in lieu of tithes is not by the statute rendered a charge on the inheritance; and that the owner of the rent-charge was not entitled to claim a sale of the lands in order to recover the arrears of his rent-charge.

THE Plaintiffs, Messrs. *Crawshay Bailey* and *William Bailey Partridge*, were possessed of the rent-charges in lieu of tithes of an extra-parochial place known as *Lee Chapel*, in the county of *Essex*, for the residue of a term of 1000 years from the 11th of April, 1872.

On the 1st of October, 1879, the lands were and had been in the occupation of one *William Roper*, who, by deeds dated respectively the 13th of September, 1855, the 9th of November, 1859, and the 13th of June, 1867, had mortgaged them to the Defendants, the Rev. *Thomas Leopold Badham*, *John Slater*, and *Francis Trapp*.

The action was commenced on the 15th of December, 1883, and a statement of claim was delivered on the 28th of March, 1884, stating that no rent-charges in lieu of tithes had been paid in respect of the lands since the 1st of October, 1879, that the lands were, and for a long time had been, uncultivated, barren, and unproductive, having nothing on which the Plaintiffs could distrain, and not yielding any rents or profits. Four sums in lieu of tithes had become due since the 1st of October, 1879, namely, on the 1st of October, 1880, £24 2*s.* 4*d.*; on the 1st of October, 1881, £23 10*s.* 4*d.*; on the 1st of October, 1882, £22 11*s.* 2*d.*; and on the 1st of October, 1883, £22; making together £92 3*s.* 10*d.* The Plaintiffs claimed the payment of the

£92 3*s.* 10*d.* arrears; also a declaration that they were entitled in priority to all other persons to a charge on the lands for the sums due and to become due; if necessary for an account of the arrears; and lastly, that the lands, or so much of them as might be necessary, might be sold, and the proceeds applied to what should be found due to the Plaintiffs in respect of the arrears.

A statement of defence was delivered, and issue was joined on the 16th of June, 1884.

It was in evidence that several ineffectual attempts had been made by the Defendants, as mortgagees, to sell the lands. They were not in possession, and had refused to go into possession, of the lands.

Fischer, Q.C., and *Eustace Smith*, for the Plaintiffs:—

The sole question for the consideration of the Court is, whether, under the circumstances of this case, the Plaintiffs have a right to sell the lands, and out of the proceeds to retain for themselves the arrears of rent-charge.

Sect. 67 of the *Tithes Commutation Act*, 6 & 7 Will. 4, c. 71, (13th August, 1836) provides that, instead of tithes, there shall be payable thenceforth to the persons entitled a sum of money, ascertainable as therein mentioned, "in the nature of a rent-charge issuing out of the lands charged therewith." Sect. 81 enacts that if the rent-charge shall be in arrear for twenty-one days it shall be lawful for the person entitled "to distrain upon the lands liable to the payment thereof," for all arrears of the said rent-charge, "provided that not more than two years' arrears shall at any time be recoverable by distress." Sects. 82, 83, and 84 relate to the same subject, and then sect. 85 enacts that whenever any rent-charge payable under the Act shall be in arrear, notwithstanding any apportionment which may have been made of such rent-charge, every part of the land occupied by the same person as the occupier of the lands on which the rent-charge shall be in arrear shall be liable to be distrained upon or entered upon as aforesaid; provided "that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty."

V.-C. B. 1885 BAILEY v. BADHAM.

The *Commutation of Tithes Act Amendment Act* of 1846 (9 & 10 Vict. c. 73) gives powers to landowners to redeem a rent-charge not apportioned where the amount does not exceed £15, and this Act was amended and extended by another Act in 1878 (41 & 42 Vict. c. 42).

Our contention is, that the Legislature in giving powers of distress and entry did not mean to take away the other legal incidents to a rent-charge, amongst which is a right of sale to pay for arrears; and that as, in this case, distress is a remedy practically unavailing, the right of sale remains. This seems to have been the view of Sir *C. Hall*, V.C., in *Scottish Widows' Fund* v. *Craig* (1), who refers to the *Tithes Commutation Act*; and the House of Lords has held that under the *Irish Church Acts*, "rent-charge" is "rent" within the meaning of the *Statutes of Limitation*: *Irish Land Commission* v. *Grant* (2). The statutory remedies given by the *Tithes Commutation Act* are additional, not substitutional; and the statutory provisions for redemption are a proof that the rent-charge is simply an incumbrance on the estate. We ask, therefore, for an account and sale, in discharge of this, like any other incumbrance on the inheritance.

Other sections of the general Act of 1836 bearing on the question are the 17th, 21st, 29th, and 37th, the result of all which is to shew that the rent-charge is necessarily a charge on the inheritance, otherwise great injustice might be done, as the whole tithe rent-charge might be thrown upon barren and worthless land.

Marten, Q.C., and *Russell Roberts*, for the Defendants:—

This is an entirely new claim; no one ever heard of its having been made before.

The case before Vice-Chancellor *Hall* turned upon the construction of the *Drainage Acts*, in which the language and the object of the Legislature were wholly different. Expenses of drainage are necessarily a charge on the inheritance; tithes are only a part of the produce. Tithes were payable by the occupier only.

The case in the House of Lords turned upon the construction of the *Irish Church Acts*, where, again, the language and scheme of legislation were wholly different.

(1) 20 Ch. D. 208, 214. (2) 10 App. Cas. 14, 30.

The Redemption Acts that have been referred to really do not affect the question.

Bacon, V.C.:—In my opinion they relate to a different subject.

Marten, in continuation:—

Sect. 67 is really the governing section; and there the words are that the sum of money payable shall be—not a rent-charge, but—"in the nature of a rent-charge."

Another difficulty in the way of the Plaintiffs is this. If the tithe-owner sells, he must sell free from incumbrances, in order to pay off his own debt. Hence the land in the hands of the purchaser would become tithe-free, and thus portions of land might gradually become exempt from payment of tithe altogether.

The argument assumes that the rent-charge mentioned in the statute is the same thing as a rent-charge at common law. But this is by no means proved.

There is no magic in the word "rent-charge." What it means has been defined in *Clun's Case* (1). "Tithes" are defined in *Blackstone's* Commentaries (2) as being "the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants." In the older statutes, the 27 Hen. 8, c. 20, the 32 Hen. 8, c. 7, and the 2 & 3 Edw. 6, c. 13, the remedy for the recovery of tithes was always a personal one. There was nothing before the Act, and there is nothing in the Act, to make tithes, or the rent-charge in lieu of tithes, a charge on the inheritance.

Fischer, in reply:—

The novelty of the application is owing solely to the depreciation in the value of landed property of this kind. If the Plaintiffs' argument be correct, it is the profits of the land only that are charged. We contend that the rent-charge issues out of "the land," not out of "the rents and profits of the land": *White* v. *James* (3); *Cupit* v. *Jackson* (4).

(1) 10 Rep. 126 a; *Tudor's* Leading Cases on Real Property, 284, 293.

(2) Ed. of 1768, vol. ii. p. 24.

(3) 26 Beav. 191.

(4) 13 Price, 721, 733.

V.-C. B. BACON, V.C.:—

1885

BAILEY v. BADHAM.

It has been truly said that this is the first time this question has been submitted to the Court.

The *Tithes Commutation Act* is half a century old, or very nearly so; it was passed in 1836, and we are now in 1885. I do not think, according to my experience and knowledge, that tithes are so punctually paid as that tithe-owners have not had frequent occasion to complain of the reluctance of people who are liable to pay them in acquitting themselves of their duty. However that may be, that does not form any material for my present decision. I am now called upon, after the lapse of half a century, to put a particular construction upon the *Tithe Act*, and to hold, where the *Tithe Act* says a rent-charge shall be substituted for the then existing modes of compelling payment of tithe, that that is a charge upon the inheritance. If it is not a charge upon the inheritance, the Plaintiffs have no ground upon which their claim can be sustained.

Mr. *Russell Roberts* has taken the trouble to look back into *Coke's* Reports, and to read from a chapter in *Blackstone* passages with which a good many of us are familiar. The nature of a rent-charge is plain and distinct. It cannot come into existence but by the act of the person who is entitled to the inheritance. The owner of the inheritance alone can make a rent-charge. I find that the Act of Parliament uses the words "in the nature of a rent-charge," and this is the phrase that I am called upon to construe. Mr. *Fischer* asks me to say that the words "in the nature of a rent-charge" mean as if somebody who was the owner of the land had created a rent-charge; because without that the inheritance cannot be charged. The meaning of the *Tithes Commutation Act* is plain. The nature of tithes before the Act of Parliament was passed is perfectly plain. The right is as old as Leviticus. It is a right to receive what? A portion of the annual produce of cultivated land—that and nothing else. When the produce has come into existence by the exercise of human industry, then there comes a duty to yield up a portion of the produce. Before the *Tithes Commutation Act* it went to the person entitled to the tithe, but the Legislature has thought fit to alter

that, not to alter the nature of tithes. If one keeps in mind first, what are tithes, and next, what is a rent-charge, the legal definition of which is beyond the possibility of question, the difficulties, if any, are easily removed. The 67th section enacts that, from the period mentioned, the land shall be discharged from the payment of all tithes, "and instead thereof there shall be payable thenceforth to the person in that behalf mentioned in the apportionment, a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats respectively mentioned therein to be payable instead of the said tithes, in the nature of a rent-charge issuing out of the lands charged therewith." Those are the only words upon which this application can be sustained. It goes on to enact: "And any person entitled from time to time to any such varied rent-charge shall have the same powers for enforcing payment thereof as are herein contained concerning the original rent-charge." The 81st and 82nd sections, which I need not read, provide the means by which the owner of the rent-charge, as it is called in this Act of Parliament—the owner of the tithes as he was before the Act was passed—shall be able to recover, and it limits his right to recover by exercising those powers to a period of two years. Is not that perfectly consistent with the nature of tithes? Is it not perfectly consistent with public interests that this right to receive out of the annual produce of cultivated land a certain portion, should be limited to two years? The personal liability to pay is abolished. The right to recover is to recover in respect of the produce of the land, and as a matter of public interest the right to recover is limited to two years, and for a very good reason, as it occurs to me, because it would be injurious to persons, and injurious to all the public, that this demand of the annual payment should be left in suspense for a longer period than two years. The person entitled to receive the rent-charge might suffer a debt to accumulate in respect of it, and then say, "I am the first mortgagee; I have a charge; my charge is superior to every other charge which the owner of the land can have created by mortgage or otherwise; I have a right to have the land sold for the payment of my arrears of the rent-charge." I can find no colour of reason for this in the nature of things, and

V.-C. B. 1885 BAILEY v. BADHAM.

I can find no words in the Act of Parliament which justify the claim.

The case before Sir *Charles Hall* is plainly inapplicable to the state of things I have been describing. In that case there was a body of persons who had a statutory right to charge the inheritance, and they did charge the inheritance, and the Vice-Chancellor, being asked to consider that state of circumstances, assisted himself by considering certain cases which had preceded that before him, in all of which the inheritance had been charged. But as I read this Act, neither the words in it, nor the policy of the Legislature, nor the nature of the subject, suggest to me any plausible reason why it can be said the Legislature meant to say: "We exercising the paramount and supreme authority which the Legislature possesses, create a charge upon the inheritance." If they had intended that, is it to be suggested for a moment that in a statute so carefully prepared, upon a subject so important, and which underwent such an amount of discussion in and out of the Houses of Parliament, that intention would have been omitted to be stated? It would have been wholly inconsistent to say that persons entitled to possession of lands are to be deprived of their inheritance because some tenant for life or somebody else has neglected to perform his duty. I am wholly unable to read this Act of Parliament in such a way.

The case in the House of Lords has really no application whatever to the case before me. It is a practice that has grown up very much to pick out some *obiter dictum*, especially of a noble Lord when he is giving judgment in the House of Lords; and it happens also in our Courts, that things are said and said only for the purpose of illustrating the observations which form the judgment. The case there was whether the word "rent," contained in the *Statute of Limitations*, applied to the rent-charge there; and without much hesitation the House decided that the action was barred by reason of the lapse of time. What is there in that which should influence my judgment? Here I find that the persons who are entitled to the tithe are so unfortunate as to be the owners of land which produces nothing. They do not avail themselves of the power given them by the Act of Parliament to distrain, because there is nothing to seize; and they ask me now

to sell the land in order that they may obtain the arrears of the rent-charge. No doubt the practical difficulty suggested by Mr. *Marten* is very great. If you were to sell this land now to pay for the arrears, what is to become of the future owners? How are they to get their rent-charge? Their right to the tithe, which is called a rent-charge, is to receive it out of the produce of the land, no matter into whose hand it goes. They cannot sell any part of the land.

But it is not necessary for me to pursue that branch of the discussion. I come to the conclusion that in the *Tithes Commutation Act* all that is given to tithe-owners is that they shall take out of the produce of the land the proportion mentioned in the Act. They have a right to compel the payment of that by distress and entry for two years, and they have no power, or right, to exercise the power of distress and entry except for two years.

The persons who are made Defendants to this suit have really nothing to do with it. The first is a mortgagee, and he declines to take possession, and the other Defendant is the trustee in bankruptcy, in whom is vested the equity of redemption of the mortgage, and he declines to have anything to do with it. I am obliged to dismiss this action, and I must give the Defendants the costs.

Solicitors: *Beaumont & Warren; A. E. Francis.*

J. B. D.

V.-C. B.
1885
June 20, 22.

MANTON *v.* TABOIS.

[1884 M. 3928.]

Will—Construction — Gift of "Furniture, Goods, and Chattels" — Ejusdem Generis—Gift of "all my interest in C. Estate"—Purchase-money—Mixing with Money at Bankers—Deposit—Ademption.

A testator, after bequeathing pecuniary legacies, directed them "to be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols." And after directing that the whole of his income should be devoted to the comfort and maintenance of his wife, and that she should have the use of his residence, he desired "that the furniture, goods, and chattels be not sold during my wife's lifetime, but at her decease be divided among the executors." And after the death of his wife he bequeathed to *M.* "all my interest in the *C.* estate."

Prior to the date of the will, the *C.* estate, which had been appointed by will by the testator's wife to him absolutely, was taken by the M. Board of Works, the purchase-money being paid into Court. Subsequently, the wife died and administration with her will annexed was taken out by the testator, who then conveyed the *C.* estate to the Board, and obtained payment out to himself of the purchase-money, which he placed with his bankers partly on deposit and partly to his general account with his other moneys, from time to time drawing on that general account. At his death there stood to his credit at his bankers the sum on deposit and a balance on his general account:—

Held (1), applying the rule *ejusdem generis*, that the gift of "furniture, goods, and chattels," passed only such furniture, &c., as, on the house being let furnished, would go with the occupation of the house, and not such articles as jewellery, guns, pistols, tricycles, and scientific instruments; (2), that the gift of "all my interest in the *C.* estate," had been adeemed and did not pass the money on deposit or any part of the balance at the bankers.

Clark v. *Browne* (1) not followed.

Moore v. *Moore* (2) distinguished.

PROFESSOR *TABOIS*, of *Lawn Villa, Shepherd's Bush*, by his will, dated the 10th of August, 1880, after giving various pecuniary legacies, amounting to upwards of £500, proceeded as follows:—"These legacies to be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols., within six months after my decease. It is my wish that the whole of my annual income shall be devoted to

(1) 2 Sm. & Giff. 524. (2) 29 Beav. 496.

the comfort and maintenance of my dear wife, *Elizabeth Tabois*, and that her residence be at *Lawn Villa, Shepherd's Bush*, so long as the lease thereof shall last and the safety and fitness of the house be agreed upon by my executors. I desire that the furniture, goods, and chattels be not sold during my wife's lifetime, but at her decease be divided among the executors." And after giving directions as to the care of his wife, who was then suffering from mental infirmity, and devising certain freehold and leasehold properties, the testator proceeded as follows :—

"And after the decease of my dear wife I bequeath to *Edward Brinkworth Manton* all my interest in the *Coventry Street* estate." And he appointed *Edward Brinkworth Manton*, *John Parnell*, and *Frederick William Tabois*, executors of his will. The will contained no residuary gift.

The testator died on the 22nd of September, 1883, possessed of real and personal estate of considerable value.

The *Coventry Street* estate referred to in the will consisted of a freehold house in *Coventry Street, Haymarket*, which formerly belonged to the testator's wife, *Elizabeth Tabois*, and was settled by her upon her marriage with the testator.

In 1866, Mrs. *Tabois*, in pursuance of a power contained in the settlement, had made a will appointing the property (subject to her life estate therein) to her husband absolutely.

In 1878 the property was purchased by the Metropolitan Board of Works for £4800. In July, 1880, the Board took possession, on payment of the purchase-money into Court, Mrs. *Tabois*, who was tenant for life under her marriage settlement, being unable to execute a conveyance.

Mrs. *Tabois* died on the 12th of October, 1880, and in January, 1881, her husband took out administration to her estate with her will annexed. In May, 1881, he conveyed the *Coventry Street* property to the Metropolitan Board of Works, and on the 1st of June, 1881, obtained payment out of Court to himself of the £4800.

At the date of the testator's death his residence, *Lawn Villa, Shepherd's Bush*, contained, besides the usual household furniture, a collection of jewellery, coins, guns, pistols, tricycles, and scientific instruments of considerable value, and the question arose

V.-C. B. 1885 MANTON v. TABOIS.

whether these articles passed under the bequest of "furniture, goods, and chattels." *F. W. Tabois*, who, besides being one of the executors of the will, was also one of the testator's next of kin, claimed that they did not so pass and were undisposed of by the will.

Another question was whether any part of the £4800, the purchase-money for the *Coventry Street* property, passed to *E. B. Manton*, under the bequest of "all my interest in the *Coventry Street* estate?"

Upon this latter point the following facts appeared from the testator's banking account with the *Shepherd's Bush* branch of the *London and South Western Bank*.

On the 14th of June, 1881, the testator paid the £4800 into his current account, he having at the time a balance of £511 13*s.* 6*d.* to that account. On the same day he withdrew £4000 and placed it to a deposit account at the bank. Between that date and the 19th of December, 1881, he paid to his account sums amounting to £155 10*s.* 1*d.* and drew out sums amounting to £418 12*s.* 5*d.* On the 19th of December he withdrew the £4000 deposit and placed £2000 of it to his current account, and the remaining £2000 to a new deposit account. Between that date and his death he paid into his current account further sums amounting, with the interest credited on the deposit, to £327 4*s.* 6*d.*, and drew out sums amounting to £1071 5*s.*

At the date of his death, the 22nd of September, 1883, the testator had £2000 on deposit account and £2304 10*s.* 8*d.* on current account.

E. B. Manton claimed that the £2000 on deposit, and at least £1977 6*s.* 2*d.* of the money standing to the current account, passed to him by virtue of the bequest of the testator's "interest in the *Coventry Street* estate."

To have these questions decided, this action was instituted by *E. B. Manton* and his co-executor, *J. Parnell*, against *F. W. Tabois*, the other executor and one of the next of kin, for the administration of the estate and to have the rights of the parties declared.

On the 12th of June, 1884, an administration judgment was pronounced, and the following inquiries, amongst others, were directed, namely, an inquiry of what the "furniture, goods and

chattels" mentioned in the will consisted, and what had become of the same respectively; and an inquiry what property was comprised under the specific bequest of "all my interest in the *Coventry Street* estate," and whether any and what property passed to the Plaintiff *E. B. Manton* by virtue of that bequest.

In answer to these inquiries the Chief Clerk by his certificate, dated the 30th of April, 1885, certified that everything in and about the testator's residence, including the jewellery, guns, pistols, tricycles and scientific instruments detailed in the schedule to the certificate, passed under the bequest of "furniture, goods and chattels," and that no property passed under the bequest of "all my interest in the *Coventry Street* estate."

The Defendant, as one of the next of kin, then took out a summons to vary the certificate by certifying that the jewellery, guns, pistols, &c., did not pass under the first bequest; and Mrs. *Manton*, the widow and executrix of the Plaintiff *E. B. Manton*, who had died, also took out a summons to vary the certificate by certifying that the £2000 on deposit and £1977 6*s.* 2*d.*, part of the money on the testator's current account, or such other sum or sums as the Court might think proper, passed to the Plaintiff *E. B. Manton* under the second bequest.

These summonses now came on for argument.

Marten, Q.C., and *Bleby*, for the Defendant on the first summons:—

"Furniture, goods and chattels" should be restricted to articles *ejusdem generis*: *Lamphier* v. *Despard* (1); *Gibbs* v. *Lawrence* (2); *Timewell* v. *Perkins* (3); *Roberts* v. *Kuffin* (4); *Stuart* v. *Marquis of Bute* (5). The testator's purpose was to provide for the comfort and maintenance of his wife, and therefore to give her the enjoyment of such articles only as would be necessary for that purpose.

Millar, Q.C., and *Methold*, for Mrs. *Manton*, the legal personal representative of *E. B. Manton*, the deceased executor, *contrà*.

(1) 2 D. & War. 59.
(2) 7 Jur. (N.S.) 137; 30 L. J. (Ch.) 170.
(3) 2 Atk. 102.
(4) 2 Atk. 112.
(5) 1 Dow, 73, 84; 11 Ves. 657, 662.

V.-C. B. 1885 MANTON v. TABOIS.

Sir *A. T. Watson*, for the Plaintiff *Parnell*, an executor, cited *Swinfen* v. *Swinfen* (1) as an authority against the application of the *ejusdem generis* rule.

Millar, Q.C., and *Method*, for Mrs. *Manton*, on the second summons:—

We submit that the money on deposit and a considerable portion of the money at the bankers on current account passed under the gift of "all my interest in the *Coventry Street* estate." The question in such cases is whether the fund representing the original subject-matter of the gift can be traced and sufficiently distinguished from the rest of the testator's estate; if so, the fund passes under the gift: *Clark* v. *Browne* (2); *Moore* v. *Moore* (3); *Morgan* v. *Thomas* (4). Here the proceeds of the property can be so traced and distinguished.

Marten, Q.C., and *Bleby*, for the Defendant:—

This is a plain case of ademption, for at the date of his will the testator had no interest in the *Coventry Street* estate. It is also clear that he mixed the proceeds of the property with his other moneys, dealing with the whole as his own. In *Harrison* v. *Jackson* (5) the late Master of the Rolls declined to assent to the doctrine of tracing, and disapproved of *Clark* v. *Browne*. Moreover, in *Clark* v. *Browne* Vice-Chancellor *Stuart* expressly distinguished the case before him from one in which the testator mixed the moneys in question with his own. In *Moore* v. *Moore* the fund was kept distinct, and there was a bequest which fitted the case. *Morgan* v. *Thomas* was, as Mr. Justice *Fry* said, "primarily one of construction." A specific devise of land will not pass the purchase-money: *In re Bagot's Settlement* (6).

Millar, in reply:—

This case is not one of ademption but of construction, as in *Morgan* v. *Thomas*. The money having been traced, it is the duty of the Court to prevent the testator's intention being

(1) 29 Beav. 207.
(2) 2 Sm. & Giff. 524.
(3) 29 Beav. 496.
(4) 6 Ch. D. 176.
(5) 7 Ch. D. 339.
(6) 31 L. J. (Ch.) 772.

defeated. At all events the £2000 on deposit is ear-marked, and therefore passes under the gift.

BACON, V.C.:—

There are two questions which I have to decide, both of which arise out of this will; and, in deciding those questions, of course regard must be had to the will itself. The will in question is that of a gentleman of considerable wealth, and engaged in scientific and literary pursuits.

The testator begins by directing the payment of a variety of legacies, and then he directs that these legacies, amounting to more than £500, are "to be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols"—a circumstance that is to be taken into consideration in construing his will; and in another part of his will, to which my attention was particularly called, after having provided that the whole of his income should be devoted to his wife, and that her residence should be at the house at *Shepherd's Bush*, so long as the lease thereof should last, and the safety and fitness of the house be agreed upon by his executors, the testator says this: "I desire that the furniture, goods and chattels be not sold during my wife's lifetime, but at her decease be divided among the executors." That raises the first question which was argued before me, namely, whether those words "furniture, goods and chattels" which the testator directs are not to be sold during his wife's lifetime, are confined to the popular meaning of them, that is to say, to the furniture, goods and chattels which are in the house and used in the house, the quiet possession of which he provides for his wife. I cannot entertain any doubt that the rule *ejusdem generis* applies to this particular case, and that nothing passes by this bequest beneficially to the executors, but the things which were actually in the house and were necessary for the use and comfort of the testator's wife in the enjoyment of the life interest which he gave her; and that it does not pass guns, nor revolvers, nor jewellery, nor scientific instruments, nor any of the other things which are mentioned at such length in the schedule to the Chief Clerk's certificate, but that it is literally confined to those things which, if the house had been put up to

V.-C. B. 1885 MANTON v. TABOIS.

be let to a tenant as a furnished house, would have been passed over to that tenant in order that he might occupy the house. For instance, if an auctioneer had this house to let as a furnished house, and he let it, he would not pass to the tenant such articles as jewellery, or guns, or scientific instruments. That is enough for me to say upon the first question. The first summons must therefore be allowed.

The second question is one of much greater nicety, and arises upon these words: "after the decease of my dear wife, I bequeath to *Edward Brinkworth Manton* all my interest in the *Coventry Street* estate."

Now, in construing those words, under the circumstances that have happened, I must, in the first place, have regard to the well-established rule of law relating to ademption.

Mr. *Millar* has argued that this is a question of construction and not of ademption; but in my opinion, this is clearly a case of ademption.

The rule of ademption is very plain. If a man having a debt due to him leaves it by his will to somebody else, and afterwards in his lifetime receives that debt, the legacy is adeemed. Nobody can doubt that general principle. The facts before me are these. The testator had, at the time he made his will, the prospect of an interest in the *Coventry Street* property. The will speaks from the time of his death; and at the time of his death the interest which he had in prospect when he made his will had fallen into possession, the property itself had been realised, and the proceeds had been received by the testator. The interest which he had in the *Coventry Street* property was derived under a settlement, and was subject to the chance of his wife's power of appointment, which she had executed in his favour, coming into operation. Being thus entitled to an interest in the property, how does he deal with it? In July, 1880, the money which was payable by the Board of Works had been paid into a bank, and that was the state of things when, in August, 1880, the testator made his will. The wife died in October of the same year, 1880; and in January, 1881, the testator administered to his wife's estate and thus became entitled to receive the money which had been paid in. In May, 1881, he conveyed to the Board of Works all the interest which he had acquired under his wife's administra-

tion with her will annexed in the *Coventry Street* property. In June, 1881, he received the purchase-money out of Court and then became possessed of the sum of £4800. He received it himself. The question then arises, is that ademption? What he does with the money is, he pays the whole of it into his banking account. Any more distinctive plain act of ownership over the whole of the money can hardly be conceived. What becomes of money which you pay into your banker's? The banker becomes your debtor for that sum of money, and you have the right to deal with it and draw it out whenever you please. Having, then, paid the whole of the £4800 into his banking account, he takes out of it £4000 which he places on a deposit account. What is that but taking a security from the banker to pay him £4000, when, upon giving the requisite notice, he shall ask for payment? Could anything be more clearly, distinctly, and unquestionably his property than that £4000 which he placed on the deposit account? But the mode in which the testator deals further with the money affords still stronger evidence of ownership. He afterwards withdraws the £4000 deposit, places £2000 of it on a new deposit account, and pays the other £2000 into his general account: he draws upon that general account by driblets as people ordinarily do when they have banking accounts, without distinguishing any part of the £2000 paid in from the other sums drawn out, treating himself as the owner of the money and the person entitled to deal with it: and he deals *de facto* with the whole of the fund, as well the £2000 placed on deposit as the £2000 which was carried to his general account. In my opinion that was clearly *de facto* an ademption; and I think it is not a case of construction. It is not like the case before Mr. Justice *Fry* of *Morgan* v. *Thomas* (1), where the question was treated as one of construction only and not of ademption; and the reason for holding that it was not a case of ademption was stated to be that the property could be in fact distinguished. How could the property be distinguished in the present case? How can I distinguish the proceeds of the *Coventry Street* estate in the sum standing to the testator's general account in the bank, or attempt to divide the sum that is now standing to his credit in that general account,

(1) 6 Ch. D. 176.

V.-C. B. 1885 MANTON v. TABOIS.

when in his will he directs the payment of legacies out of his general account and out of all moneys he might have in consols? A more clear disposition of the money I cannot conceive. The testator speaks, as I have said, as from the day of his death; and from that time the most prominent feature in the will is, that out of the "money at my bankers or in the 3 per cent. consols" he directs the payment of these legacies. But, even if that feature were wanting in the case, I should say it is as plain an ademption in point of law as anything can be. When it is said that the question is one of construction, I say, considering the position in which the testator stood at the time he made his will—that his wife was, though of unsound mind, not hopelessly so, but capable of making a will, that she had made one will and might make another—when he speaks of his "interest," he means "the interest which I shall derive." Even if we give to that plain expression the usual wide signification ascribed to it, how can that alter the law of ademption and entitle me to say that it was not in the power of the testator to receive any part of that which he was entitled to, or to deal with it as he should think fit? He did deal with it as any man would deal with his own money, by paying the money into his bankers and drawing upon it as to one part, and as to the other part, leaving it standing in his bank to his credit.

I think this case is clearly distinguishable from that before Mr. Justice *Fry*, because there it was admitted as a fact that the subject-matter in question could be easily distinguished. Here, as I say, it could not be distinguished. A judgment debtor would have had a right to take this money in execution; the legatees had a right to the payment of their specific sums out of this money. All the *indicia* that can be applied by way of test to the question whether this money was his own, unfettered, and not belonging to anybody else, are to be found in this case.

Now the case of *Clark* v. *Browne* (1), which was strongly relied upon by Mr. *Millar*, can hardly be said to be an authority when I find two Judges like Vice-Chancellor *Stuart*, who decided that case, and the late Master of the Rolls, who decided *Harrison* v. *Jackson* (2), at variance upon such a question. I do not say the Master of the Rolls possessed any higher authority than the

(1) 2 Sm. & Giff. 524. (2) 7 Ch. D. 339.

Vice-Chancellor *Stuart*, but he had the right to point out that the decision went upon some view of law which forms no part of our jurisprudence.

In *Harrison* v. *Jackson* (1) the Master of the Rolls—after referring to that part of the judgment of Sir *John Stuart* where he stated, as the reason for holding that there was no ademption, that the sums received by the testator were kept separately invested and not mixed with his own money, so that there was, as he considered, an identity between the fund invested and the subject of the gift—said, "I must say I cannot reconcile that case with the doctrine of ademption." Seeing, then, the conflict between these two Judges, with great reverence and respect I cannot say that *Clark* v. *Browne* (2) is any authority upon the question before me.

Then the case of *Moore* v. *Moore* (3) went upon the same ground as *Clark* v. *Browne*. There it was held that the words of the bequest were plainly indicative of the fund in question, and identified the fund as pointedly as if the testator had said, "the money that I have in my drawer," or "the money that is in a bag in my bedroom." There the identity was clear and established; but here there is not only no identity but no similarity between the money in question and the subject of the gift. Unless it could be said the money was not his, or that it was not capable, the moment before his death, of being all drawn out from the bank, it is impossible to say there is any identity between that money and his "interest" in the *Coventry Street* estate, an interest which at the time he acquired it was inchoate and uncertain, his wife being alive, and nothing whatever having been done with regard to receiving the purchase-money. In my opinion the Chief Clerk was perfectly right, and therefore I hold that the money which forms the subject of the second summons did not pass by the will as the testator's "interest" in the *Coventry Street* estate.

This summons must therefore be dismissed.

The costs of all parties on both summonses will come out of the estate.

Solicitors: *Morgan & Son; Johnson & Master; Howard & Shelton.*

(1) 7 Ch. D. 339. (2) 2 Sm. & Giff. 524. (3) 29 Beav. 496.

G. I. F. C.

V.-C. B.

1885

July 11.

In re HOUGHTON ESTATE.

Settled Estate—Settled Heirlooms—Power of Tenant for Life to sell—Leave of the Court—Improvements—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* vii.; *s.* 25, *sub-ss.* i., iii., x., xi., xiii.; *s.* 37—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7.

A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, and also a power to sell certain settled heirlooms, asked leave of the Court under sect. 37 of the *Settled Land Act*, 1882, that he might be authorized to sell part of the settled estates, and also a specified portion of the heirlooms; that the money might be paid to the trustees, and that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (1) a larger and better supply of water to a mansion-house; (2) a new and improved system of drainage of the mansion-house; (3) rebuilding of the stables, which were out of repair; (4) the building of an agent's house; and (5) the building of two cottages.

The trustees submitted that the proposed improvements (except the cottages) were not within the 25th section of the Act of 1882; and, that even if they were, the Court would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms:—

Held, that the proposed outlay was all within sect. 25 of the *Settled Land Act*, 1882; and would have been authorized without the statute; and leave given to the tenant for life to sell both the settled estates and the heirlooms, and for the application of the proceeds as prayed.

By an indenture of settlement dated the 4th of July, 1879, and made between the late Marquess of *Cholmondeley* of the first part, the Petitioner, the present Marquess, of the second part, *John Eldad Waters* of the third part, and Lord *Tollemache*, *Granville R. H. Somerset*, Esq. (since deceased), and Sir *Henry William Dashwood*, Bart., of the fourth part, certain hereditaments in the county of *Norfolk*, comprising the mansion-house called *Houghton Hall*, and known collectively as the *Houghton* estate, were conveyed to the use of the parties thereto of the fourth part upon trust, amongst other things that they or other the trustees should "when and if they or he shall deem it proper and for the benefit of the persons interested in the proceeds of sale, but not otherwise, and with the consent in writing of" the late Marquess and the Petitioner during their joint lives, and of the survivor of them during

his life, and, after the death of such survivor, at the discretion of the trustees, to sell the hereditaments in manner therein mentioned and stand possessed of the proceeds of sale upon the trusts declared by an indenture of even date.

By an indenture of even date and made between the late Marquess of the first part, the Petitioner of the second part, the said trustees of the third part, and *John E. Waters* of the fourth part, after reciting, amongst other things, that by virtue of a settlement of the 28th of October, 1854, therein referred to, and the will and codicil of *George Horatio*, the late Marquess of *Cholmondeley*, certain books, pictures, engravings, works of art, china, household goods, furniture, and other effects, partly at *Cholmondeley Castle*, in the county of *Chester*, and partly at *Houghton Hall*, *Norfolk*, and certain plate and jewels therein mentioned, were vested in the above-named trustees, upon trust for the late Marquess for life, with remainder to the Petitioner absolutely—such parts of the *Cheshire* estates as were of freehold tenure were settled to certain uses under which the late Marquess took an estate for life, the Petitioner took an estate for life with power to make certain charges, with remainder to his first and other sons in tail male, with divers remainders over. And by the same indenture all and singular the books, pictures, engravings, works of art, plate, china, household goods, furniture, and other effects and jewels comprised in the said indenture of settlement of the 28th of October, 1854, or in the said will of *George Horatio*, Marquess of *Cholmondeley*, were assigned to the said trustees "upon trust to allow the same to go, devolve, and remain as heirlooms together with the settled freehold estates so far as the rules of law and equity will permit; but so nevertheless that the said chattels and premises or any share thereof shall not vest absolutely in any person thereby made tenant in tail male or in tail by purchase of the settled freehold estates or of any individual share thereof, unless such person shall attain the age of twenty-one years; but on the death of such tenant in tail male or in tail by purchase under the age of twenty-one years shall go, devolve, and remain in the same manner as the settled freehold estates or the corresponding undivided share thereof." And it was provided that "as regards such of the said chattels as are at *Houghton*

V.-C. B. 1885 *In re* HOUGHTON ESTATE.

Hall aforesaid it shall be lawful for the said trustees or trustee with the consent of" the late Marquess and the Petitioner during their joint lives, and of the survivor of them during his life, and after the death of such survivor at the discretion of the trustees, to sell all or any of the same chattels, either together with the mansion of *Houghton Hall* or separately, and it was declared that the sale moneys should be held and applied by the trustees upon the same trusts as were therein declared and contained concerning the moneys to arise from the sale of the *Norfolk* estates. These trusts were declared to be to pay off or discharge certain capital sums and rent-charges then affecting the *Norfolk* estates, by purchasing a sufficient sum of Bank annuities to provide for an indemnity against such rent-charges, and subject to the trusts aforesaid to stand possessed of the remainder of the said residuary moneys and also of the Bank annuities, and also of certain railway shares there mentioned upon the trusts declared concerning the moneys to arise from the sale of the manor of *Frodsham* therein mentioned. These trusts were to invest the proceeds in the purchase of lands to be settled to the same uses as the freehold estates already in settlement.

Of the above-mentioned *Houghton* estate, and also of *Cholmondeley Castle* and certain estates in the county of *Chester*, the present Marquess of *Cholmondeley* was now tenant for life, with remainder to his first and other sons in tail male.

The present petition was presented in the matter of the *Houghton* estate, and of the heirlooms settled by the second of the above-mentioned indentures, and of the *Settled Land Act*, 1884, by the Marquess of *Cholmondeley*, stating that he was married, and had a son, the Earl of *Rocksavage*, who was born on the 19th of May, 1883, and a daughter, and that he was desirous that the *Houghton* estate should be sold and that he should have the conduct of the sale; also that certain of the pictures forming part of the heirlooms at *Houghton Hall* might be sold, and that he might have the conduct of the sale, and that the proceeds of sale might be applied as capital moneys arising under the *Settled Land Act*, 1884. The particular heirlooms were specified in a schedule, and consisted of paintings and tapestry.

The Petitioner then stated that on the death of the late

Marquess of *Cholmondeley* it was found that *Cholmondeley Castle*, in *Cheshire*, which had long been the residence of the Marquesses of *Cholmondeley*, was in an unhealthy state owing to insufficient water supply and defective drainage; that the stable was dilapidated and insufficient for the requirements of the Castle; and that the house occupied by the agent of the estate was in bad repair and too small.

A scheme had been prepared for obtaining a water supply at an outlay of £887; of renewing the drainage at an expense of £320; of repairing the stables at a cost of £4000; of enlarging and improving the agent's house for £850; and of building two labourers' cottages for £325; making together £6382; and the Petitioner was desirous that so much of the money as should be raised by the sale of the *Norfolk* estates, and of the heirlooms proposed to be sold, should be laid out in paying for such of the improvements contained in the scheme as the Court might think fit.

The Petitioner prayed that the costs of the Petitioner, and of the trustees, and of all persons directed to be served, as between solicitor and client, might be paid out of the proceeds of the sale of the heirlooms; that the Petitioner might be authorized to sell the *Houghton* estate; that the money to arise by such sale might be paid to the trustees; and that such part of the same as might be necessary might be applied by the trustees in paying for such of the improvements as the Court might think fit; also that the Petitioner might be authorized to sell the heirlooms specified in the schedule, and that the sale moneys might be paid to the trustees and applied by them as capital money under the *Settled Land Act*, in or towards payment of the improvements or such of them as the Court should think fit.

Mr. *Christie*, of the firm of *Christie, Manson, & Woods*, auctioneers, deposed that the value of the pictures and tapestry mentioned in the schedule was in his opinion about £7000.

Marten, Q.C., and *Rawlinson* for the Petitioner:—

The application is based on sect. 37 of the *Settled Land Act*, 1882, which requires an order of the Court.

Sect. 25 of the same Act defines what are "improvements"

V.-C. B. 1885 *In re* HOUGHTON ESTATE.

authorized by the Act, and amongst such improvements are (i.) "drainage;" (iii.) "drains, pipes, and machinery" for supply and distribution of sewage as manure; (x.) "cottages for labourers, farm-servants, and artizans employed on the settled land or not;" (xi.) "farm-houses, offices, and outbuildings, and other buildings for farm purposes;" (xiii.) "reservoirs, tanks, conduits, water-courses, pipes, wells, . . . and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes; or for domestic or other consumption."

By sect. 63 of the *Settled Land Act*, 1882, any land subject to a trust or direction for sale, and for the application of the income of the sale moneys for the benefit of any person for life, is made settled land; and the tenant for life of such land is empowered to exercise the powers of the Act; so that the Petitioner is in the position of a tenant for life under sect. 63. Still, the leave of the Court is, by sect. 7 of the *Settled Land Act*, 1884, necessary to the exercise of the powers.

Hemming, Q.C., and *Latham*, for the infant tenant in tail in remainder:—

We do not oppose.

R. F. Norton, for the trustees of the settlement:—

None of these improvements, except the cottages, are within the 25th section. "Drainage" in the section clearly means only agricultural drainage; the "water supply and distribution" do not extend or apply to the improvement of a mansion-house; a stable is part of the mansion-house, and is not within the section; and an agent's house cannot be included either under the term "cottages," or under "farm-houses," or "buildings for farm purposes."

Moreover, there is already in existence a discretionary trust for sale as to the lands, and a power of sale as to the heirlooms vested in the trustees, and in such a case the Court will not give a tenant for life leave to sell, unless he makes a special case. It was not the intention of the Act that the tenant for life should come to the Court for leave to supersede the trustees. That observation applies not only to the heirlooms, but also to the

Houghton estate. The tenant for life is to act only when there is no trust or power, or it is likely to be improperly exercised. Sect. 63 of the Act of 1882 was substantially repealed or rendered inoperative, where there are conflicting powers, by the 7th section of the Act of 1884.

The trustees are not only willing, but they offer to effect a sale, if the tenant for life will apply to them, and make out a proper case.

Marten, in reply:—

As to the nature of the improvements, the cottages are admitted to be within the section; drainage is within sub-sect. i.; water supply is within sub-sect. xiii. There is nothing in the clause to exclude a mansion-house from its operation; and a stable is part of the mansion-house.

BACON, V.C.:—The only doubt I have is as to the agent's house.

Marten:—An agent must reside on the estate. His house would come under the class of "farm-houses, offices, and outbuildings, and other buildings, for farm purposes." He has to superintend the farmers and farm labourers.

The key to the whole subject is to be found in the clauses regulating the "investment" of "capital trust money." Sect. 21, by sub-sect. 7, authorizes the investment of capital trust money in land; and "land" includes all the objects specified in this petition: *In re Leslie's Settlement Trusts* (1); *In re Speer's Trusts* (2).

BACON, V.C.:—

I am surprised at the opposition to this application, coming, as it does, from trustees, who seem to be offended, and think they are injured by an usurpation of their sovereignty by the tenant for life; but the law has enabled the tenant for life to sell without their consent.

The only restriction put upon the power given to the tenant for life by the Acts of 1882 and 1884 is, that he should make out

(1) 2 Ch. D. 185. (2) 3 Ch. D. 262.

V.-C. B. 1885 *In re* HOUGHTON ESTATE.

a proper case to induce the Court to sanction his exercise of the power.

That he has done in this case; for he has represented that it is advantageous to sell *Houghton;* and that nobody disputes. He has proved that the house, *Cholmondeley Castle,* is unsuitable for present occupation, and that it would be dangerous, disadvantageous, and mischievous to the whole bulk of the property to leave it in its present condition. Repaired it must be; a supply of water is necessary, and that is plainly recognised by the statute. The strengthening of the roof upon which the cisterns rest is a necessary thing, in order to secure the proper supply of water. All the operations done about the house, therefore, are merely things which are—not improvements—not additions—not any fanciful amelioration, but things absolutely necessary for the occupation and enjoyment by the tenant for life of the house, which is his, whilst he lives. I think the evidence is sufficiently complete on that subject.

As to the stables, it appears that they are in an uncomfortable and unsuitable condition. Stables are as necessary to a house as the kitchen or the cellar. They may be said to be a part of the house—that is, they are there for the enjoyment and use of the house by the man who is entitled to enjoy them. Upon that, the evidence is perfectly satisfactory.

The other objection is, that you cannot meddle with the agent's house because that would be building something new upon the estate; but, when the evidence is looked at, it is quite clear—first, that the Act of Parliament, in plain and distinct terms, authorizes the expenditure of money in cottages for labourers, farm servants and artizans, whether employed on the settled land or not. The agent is a man whose business it is to look after the farm buildings on an estate, of, I forget how many, thousands of acres, but it is a large estate. A residence is necessary for him. The residence that exists is not suitable for him. If a cottage for a labourer were unsuitable for a labourer, there would be no hesitation in building a larger cottage for him, or in lengthening or widening a cottage which he inhabited. I think, equally, the agent ought to have a proper house provided for him. As it is clearly in evidence (and it is not contradicted) that what is

proposed to be done is in order to enable the agent to live in a suitable house, and thereby to perform his duties for farming purposes, the expenditure in that respect is perfectly justifiable and allowable.

All that the trustees have said in opposition is only by way of observation and criticism. In short, the evidence satisfies me that what the tenant for life proposes to do in the way of application of the money is fully authorized by the Act of Parliament; and it is fully authorized by the well-settled principles and practice of this Court, without reference to the Act of Parliament. The right of the tenant for life to sell, cannot, in my opinion, be questioned.

I have been told that the trustees themselves would have been willing to sell; but they have done nothing—they have said nothing—they have proved nothing that induces me to think they ever had any intention of selling. When a man who by law is entitled to sell, comes and asks for leave to do so, the trustees say he has no right to usurp their functions. That is the whole gist of the opposition that has been raised against the petition.

In my opinion the Petitioner asks for that which it is my duty to order, and therefore, the order must go in the terms of the petition.

Solicitors: *Walters, Deverell, & Co.; Bowker, Peake, Bird, & Collins; Lawrence, Graham, & Long.*

J. B. D.

V.-C. B.
1885
July 13.

In re BRYON.
DRUMMOND *v.* LEIGH.

[1885 B. 1098.]

Will—Illegitimate Child—Class of Children.

Testator by his will bequeathed to *M. B. B.*, "daughter of my nephew *J. B.*," £200; and to *T. B.*, "son of the said *J. B.*," £100. He directed his trustees to stand possessed of his residue upon trust for "all and every the children and child" of *R. C.* and *J. B.* respectively. By a codicil testator revoked the bequest of £200 "to my great-niece," *M. B. B.*, and the bequest of £100 "to my great-nephew," *T. B.*, and instead thereof bequeathed to *M. B. B.*, £100; to *T. B.*, £100; and to *A. B.*, "another daughter of my nephew *J. B.*," £100.

M. B. B. was illegitimate; *T. B.* and *A. B.* were legitimate:—

Held, that *M. B. B.* was sufficiently indicated as one of the persons who was to participate in the residue.

Megson v. *Hindle* (1) distinguished.

ADJOURNED SUMMONS.

The testator, *Henry Bryon*, by his will, dated the 3rd of January, 1865, after appointing a sole executor and trustee, and directing the payment of certain pecuniary legacies out of the residue of his real and personal estate as a mixed fund, bequeathed as follows: "To *Maud Barnes Bryon*, daughter of my nephew, *John Bryon*, of the *Cleveland Arms, Charles Street, Westbourne Terrace*, in the county of *Middlesex*, the sum of £200; to *Thomas Bryon*, son of the said *John Bryon*, the sum of £100." He then gave other pecuniary legacies, and as to all the residue and remainder of his said real and personal estate, he directed that his trustee should stand possessed thereof "upon trust to pay and divide the same unto and equally between and amongst all and every the children and child of the said *Rosetta Crouch* and *John Bryon* respectively."

On the 6th of December, 1873, the testator made a codicil to his will, and thereby, amongst other things, declared as follows: "I revoke the bequest of £200 unto my great-niece, *Maud Barnes*

(1) 15 Ch. D. 198.

Bryon, and the bequest of £100 unto my great-nephew, *Thomas Bryon*, made by my said will, and instead thereof, I bequeath to the said *Maud Barnes Bryon* £100 free from legacy duty; to the said *Thomas Bryon* the sum of £100 free from legacy duty; and to *Ada Bryon*, another daughter of my nephew *John Bryon*, the sum of £100."

On the 17th of December, 1873, the testator made a second, and on the 9th of September, 1874, he made a third codicil to his will, and thereby appointed two persons executors and trustees in place of the person appointed executor and trustee by his will, deceased.

Testator died on the 22nd of December, 1883, and his will and codicils were duly proved on the 28th of February, 1884.

Maud Barnes Bryon was illegitimate, having been born on the 6th of May, 1858, before the marriage, on the 26th of January, 1860, of her mother with her reputed father *John Thomas Bryon*. On the 12th of October, 1880, she married *Edward Simons Leigh*. *Thomas Bryon*, mentioned in the will and codicil, and *Ada Bryon*, mentioned in the codicil, were legitimate children of *John Thomas Byon*.

Ada, now the wife of —— *Gallant*, deposed that *Maud*, now Mrs. *Leigh*, was always treated as a child of deponent's father and mother, and that *Maud* and she always called each other sisters. They went to school together for many years, and were always looked upon as sisters. The testator always treated *Maud* as his niece, and she was recognised and treated by the whole of the relations of her father *John Thomas Bryon* as his daughter and as a member of the family in the same way in all respects as the other children of deponent's father and mother.

Mrs. *Leigh* herself deposed to the like effect.

The summons was taken out on behalf of the executors and trustees for the determination of several questions, of which the only one remaining was:—

Whether the Defendant, *Maud Barnes Leigh* (in the testator's will and before her marriage called *Maud Barnes Bryon*), is entitled to any and what share of the residue of the testator's estate by the will given to the children of *Rosetta Crouch* and *John Bryon* respectively.

V.-C. B.
1885
In re BRYON.
DRUMMOND *v.* LEIGH.

Begg, for the executors and trustees.

Millar, Q.C., and *Alexander Gordon*, for the Defendant, *Maud Barnes Leigh*:—

It is agreed that a gift to children without more will comprise only legitimate children; but by "necessary implication," illegitimate children may be admitted: *Crook* v. *Hill* (1); *S.C.* on appeal, *sub nom. Hill* v. *Crook* (2). The principle of *Hill* v. *Crook* was adhered to by Lord *Cairns* in *Dorin* v. *Dorin* (3), though the decision was adverse to the illegitimate children in that case. It was followed in *In re Humphries* (4).

Marten, Q.C., and *Levett*, for the children, other than Mrs. *Leigh*:—

The use of the word "daughter" is not sufficient, because the term may apply as well to a natural as to a legitimate daughter. *Bagley* v. *Mollard* (5) is exactly in point; and this decision was followed expressly by *Jessel*, M.R., in *Megson* v. *Hindle* (6).

BACON, V.-C.:—

The question in this case arises upon the words of the will, and in this case, as in all others of the kind, the only safe guide is the will itself, and the language of the will.

As to the general principle that children can only mean legitimate children there can be no doubt, but I have asked Mr. *Millar* to shew me, and he has satisfied me that the testator knew of the circumstances of his nephew's family, and that he treated all the three persons named as children of his nephew. I take the testator's own words. He describes the legatee as the "daughter" of his nephew. He afterwards by his codicil speaks of her emphatically as his "great-niece," and he speaks of another legatee who was legitimate as "another daughter" of his nephew. I have not the slightest doubt that in the gift of residue to (amongst others) "all and every the children and child of" his nephew, he meant to include this person, whom he had described

(1) Law Rep. 6 Ch. 311.
(2) Ibid. 6 H. L. 265, 283.
(3) Ibid. 7 H. L. 568, 573.
(4) 24 Ch. D. 691.
(5) 1 Russ. & My. 581.
(6) 15 Ch. D. 198.

as the daughter of his nephew—and that which he meant it is my duty to carry into execution.

I think, therefore, that *Maud Barnes Leigh* is sufficiently indicated as one of the persons who is entitled to share in the gift of residue.

I think my decision is quite consistent with the last case that has been cited, namely, *Megson* v. *Hindle* (1), because in that case the Master of the Rolls and the other Judges expressly held that if in their opinion the testator had meant that his illegitimate grandson was to be treated for the purposes of his will as legitimate, he would have been included. Here I am satisfied the testator did intend that his nephew's daughter, whom he knew to be illegitimate, was to be treated, for the purposes of his will, as if she was legitimate.

Solicitors: *Mackeson, Taylor, & Arnould; G. E. Carpenter.*

(1) 15 Ch. D. 198.

J. B. D.

KAY, J.

1885

June 2.

In re RUSSELL, SON, & SCOTT.

Solicitor and Client—Past Costs—Ex parte Order for Taxation—Motion to discharge—Parol Agreement to pay a Lump Sum—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *s.* 4 [*Revised Ed. Statutes, vol. xvi., p.* 297].

Since the *Attorneys and Solicitors Act*, 1870, a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs is not binding on the client.

MOTION.

This was a motion on behalf of Messrs. *Russell, Son, & Scott*, who carry on business in co-partnership as solicitors, to discharge an order in the usual form obtained *ex parte* on the 17th of December, 1884, by *William Wallis*, for the delivery and taxation of their bill of costs against him in a certain action in which they had been employed by him as his solicitors.

The grounds on which the applicants sought to support the motion were that *Wallis* had entered into a parol agreement with them to pay them a gross sum for their costs, and that this agreement precluded him from obtaining any order for taxation; and secondly (which part of the case does not call for a report), that upon the state and result of the cash account between them and *Wallis* the costs in question had in fact been paid, and therefore that taxation ought not to have been directed except under special circumstances, which did not exist in this case.

Hastings, Q.C., and *Lyttelton Chubb*, in support of the motion upon the first point:—

Before the *Attorneys and Solicitors Act*, 1870 (33 & 34 Vict. c. 28), s. 4, a solicitor might agree to accept a lump sum in discharge of past costs, and there is nothing in that Act which makes a parol agreement as to past costs void: *In re Whitcombe* (1); *In re Heather* (2); *In re Fernandes* (3); *Re Raven* (4).

Robinson, Q.C., and *Hodson*, for *Wallis*, were not called upon.

(1) 8 Beav. 140.
(2) Law Rep. 5 Ch. 694.
(3) W. N. 1878, p. 57.
(4) 45 L. T. (N.S.) 742.

KAY, J. (after deciding upon the question of fact that there was no evidence of actual payment of these costs, or of anything that amounted thereto, continued):—

Another ground on which it is sought to discharge this order raises a somewhat important question, viz., whether a verbal agreement to pay a lump sum for past costs is binding, notwithstanding the 4th section of the *Attorneys and Solicitors Act*, 1870.

Now, if I were to accept the argument which has been addressed to me on that point, the result would be that a verbal agreement for the payment of past costs in an action would be binding and not subject to revision, while an agreement in writing as to such costs would be within the operation of this section, and subject to revision thereunder.

That may possibly have been the intention of the Legislature, but as it has not been expressly stated to have been so, I cannot assume that it was. Reference has been made to *In re Whitcombe* (1), where it was held that a verbal agreement by a solicitor to take a sum from his client for costs was not void, though it was liable to be looked upon with suspicion. After that decision this Act was passed referring in express terms to agreements as to the payment of past and future costs, and providing for such agreements being in writing, and with a special provision for the rescission of such agreements by the Taxing Master when made in respect of business done or to be done in any action at law or suit in equity, and also, if required, by the Court.

Since that Act at any rate it seems that these agreements must be in writing, and in *Re Lewis* (2), the Queen's Bench Division held that an agreement in writing within the statute must be an agreement by both parties, and must be signed by both parties.

That case was followed by *Re Raven* (3), in which, I am told by Mr. *Hodson* who was in that case, the agreement was as to future costs.

After that there was the case of *In re Fernandes* (4), which seems to be reported only in the *Weekly Notes*. There the agreement was as to past costs, and the late Master of the Rolls seems to have held that to come within the statute there must be an

(1) 8 Beav. 140.
(2) 1 Q. B. D. 724.
(3) 45 L. T. (N.S.) 742.
(4) W. N. 1878, p. 57.

KAY, J.
1885
In re RUSSELL, SON, & SCOTT.

agreement in writing, but as I have said, that is only reported in the *Weekly Notes*. My opinion is that since the passing of the *Attorneys and Solicitors Act*, 1870, an agreement between a solicitor and his client that the solicitor is to take a lump sum for past costs should be in writing. Both the objections made to the order for taxation fail, and I accordingly dismiss this motion with costs.

Solicitors: *Russell, Son, & Scott; Shaw & Tremellen.*

W. W. K.

KAY, J.
1885
July 2.

RAWSTONE *v.* PRESTON CORPORATION.

[1885 R. 733.]

Arbitration—Shorthand Notes of Evidence and Arguments—Transcript, Production of—Privilege.

The corporation of *P.* took compulsorily some of *R.'s* land, and at an arbitration to ascertain the sum to be paid, *R.* claimed a right of way over other land to a river, and such alleged right had to be considered in regard to the sum to be assessed.

R. employed a shorthand writer to take notes of the evidence and arguments, and afterwards had them transcribed for his own purposes. Subsequently he brought an action for a mandatory injunction to compel the corporation to remove materials which they had put on the land over which he claimed the right of way. The relevancy of the notes was admitted. On motion by the corporation for the production of the transcript, *R.* objected on the ground that it was privileged, as the notes were taken at his expense and in anticipation of other proceedings against the corporation:—

Held, that the transcript of the notes was not privileged, and that it must be produced.

THIS action was for a mandatory injunction to compel the corporation of *Preston* to remove materials which had been put on the land which the Plaintiff claimed to have rights over. The Defendants took some of the Plaintiff's land under their statutory powers, and there was an arbitration between the parties for the purpose of ascertaining the sum which should be paid by the Defendants to the Plaintiff. The present action was in reference to land the value of which was not in question in the arbitration,

but as it abutted on the land the subject of the arbitration, and fronted the River *Ribble*, which the land the subject of the arbitration did not, a claim was, in the arbitration, put forth by the Plaintiff to certain rights of ownership, or of way, over the land which fronted the river, and that had to be inquired into, because if any of the rights alleged really existed the sum to be paid by the corporation to the Plaintiff would be greater.

At the arbitration the Plaintiff employed a shorthand writer to take notes of the evidence, and of the speeches of counsel, and some part of such evidence and speeches referred to the Plaintiff's claim.

This was a motion in the action on behalf of the corporation asking that the Plaintiff might be ordered to produce to them the transcript of the shorthand writer's notes of such evidence and speeches.

Hastings, Q.C., and *G. Henderson*, for the corporation, submitted that the transcript was not privileged, and that the corporation had a right to its production.

T. H. Wright, for the Plaintiff, said that he objected to produce the transcript, or any part of it, on the ground that the notes were taken and transcribed at his expense in anticipation of other proceedings against the corporation, which were contemplated, and also for the purpose, amongst others, of submitting a case to counsel for advice in reference to the action. The notes were no doubt relevant. The whole of them were privileged, but if the whole were not, he certainly objected to produce the part which referred to the examination and cross-examination of witnesses for the corporation. The Plaintiff ought not to be compelled to produce a document to enable the Defendants to refresh their memories. He referred to the case of *Nordon* v. *Defries* (1).

KAY, J.:—

The refusal of the motion would lead to an extraordinary extension of the doctrine of privilege of documents, which rests upon well-established principles. There is privilege in the case

(1) 8 Q. B. D. 508.

KAY, J.
1885
RAWSTONE
v.
PRESTON
CORPORATION.

of communications between a party and his solicitor, both in an action, and also after the disputes in reference to the action have arisen. Privilege is also extended to the materials collected by a solicitor or his clerk pending the trial of an action, for the purpose, as it is usually phrased, of preparing counsel's brief. There is privilege, but it has nothing to do with this case, in regard to the production of title deeds. In this case not one of those grounds of privilege exists. The transcript is admitted to be relevant. The land, the subject-matter of the arbitration, and the land referred to in the action are not the same. The evidence was given and the speeches were made in the presence of the corporation and their advisers, who, if they had happened to have a a shorthand writer in the room, could have had shorthand notes taken for themselves, which they would have a perfect right to use, and although they had not notes taken, it is not a valid objection to the production by the Plaintiff of his transcript of the notes which were taken for him. When the facts are stated it must be seen at once that the transcript does not come within any of the cases of privilege the principles of which are recognised, and I therefore order the production of the transcript, but I will reserve the costs of the motion until the trial of the action.

Solicitors: *Hume, Bird, & Eldridge,* agents for *Henry Hamer, Preston; Paterson, Snow, Bloxam, & Kinder.*

T. F. M.

In re LEVY'S TRUSTS.

KAY, J.
1885
July 4, 9.

Settlement of Real Estate for Life and in Remainder—Forfeiture of Interest on Bankruptcy, &c.—Meaning of "forfeited"—Insolvency in New South Wales—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 74.

In 1838 a settlement of real estate in *England* was made, and thereby the trustees were to pay the rents and profits to *S. L.* for life or until he should commit an act of bankruptcy, or commit any act, or any event should occur, whereby the rents, if settled absolutely upon or in trust for him, should be forfeited to or become vested in any other person whomsoever, and there was a gift over upon the happening of any such event. *S. L.* in 1875 was residing in *New South Wales*, and was adjudged insolvent by the Court of the colony, the Act of the colony vesting all property of the insolvent "wheresoever the same might be known or found" in the Commissioner therein mentioned. On summons taken out by *S. L.* under the *Settled Land Act* of 1882, to have trustees appointed:—

Held, that in consequence of the insolvency in *New South Wales*, the property had become forfeited and had gone over to those in remainder.

ADJOURNED SUMMONS.

By an indenture of settlement made on the 26th of June, 1838, certain freehold hereditaments situate in the county of *Middlesex* were conveyed to trustees upon trust for *Elizabeth Levy* during her life, and after her decease upon trust to pay the rents and profits of the same to her son *Samuel Levy* "during his life or until he shall make any conveyance, assignment, sale, mortgage, or charge by way of anticipation of or upon or which may affect the rents and profits hereinbefore directed to be paid to him, or any part thereof, or agree so to do, or commit any act of bankruptcy whereupon a fiat of bankruptcy shall issue and he shall be found bankrupt, or take the benefit of any Act or Acts of Parliament passed or to be passed for the relief of insolvent debtors, or shall do or commit any other act or any other event shall occur whereby the same rents and profits or any part thereof would, if hereby settled absolutely upon or in trust for him, be forfeited to or become vested in any other person or persons whomsoever," and after the determination of the interests of *Elizabeth Levy* and *Samuel Levy* upon trust for sale and division of the proceeds among the persons therein named. *Elizabeth Levy* died

KAY, J.
1885
In re LEVY'S TRUSTS.

in the year 1847. In the year 1875 *Samuel Levy* was resident in *Sydney, New South Wales.* In October of that year a petition was presented against him in the Supreme Court of that colony by a judgment creditor alleging his insolvency and praying that his estate might be sequestrated for the benefit of his creditors, and, on the 25th of that month it was ordered that his estate be adjudged to be and the same was thereby sequestrated for the benefit of his creditors. On the 13th of December, 1883, the Chief Commissioner of Insolvent Estates for the colony duly certified the discharge of *Samuel Levy,* and thereupon the proceedings in the insolvency terminated. By the Act of *New South Wales* (5 Vict. No. 17, s. 53) it was enacted that every order made for placing any estate under sequestration as insolvent should so soon as made have the effect in law to divest the insolvent and all persons administering the whole or any part of his estate for his use and behoof and to vest in the Chief Commissioner for the use and purposes of the sequestration all the present and future estate real and personal, and every right, title, and interest in and to any property real and personal, wheresoever the same might be known or found, which should belong or be due to or vested in such insolvent at the date of making such order, or which might thereafter be purchased or acquired by, or might revert, descend, or be devised, or come to the insolvent while the insolvent's estate should remain under sequestration in the hands of the Chief Commissioner, together with all deeds, vouchers, papers, and writings respecting the same, and after the said order for sequestration had been made neither the insolvent nor any person claiming through or under him should have the power to alienate, give, surrender, deliver, mortgage, or pledge, or to recover or release or discharge the same or any part thereof, neither should the same be attached by any person as the property of or belonging to the insolvent so long as the said estate should remain under sequestration. The other enactments in the statutes of *New South Wales* bearing on the subject were 5 Vict. No. 17, s. 13; 7 Vict. No. 19, ss. 14, 15, 18; 10 Vict. No. 14, ss. 1, 3. By sect. 74 of the *Bankruptcy Act,* 1869 (32 & 33 Vict. c. 71), it was enacted that "the *London* Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy

in *Scotland* and *Ireland*, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

Samuel Levy, in May, 1884, took out a summons in Chambers in the matters of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), and of the settlement of 1838, asking that the present trustees of the settlement might be declared to be or might be appointed trustees thereunder for the purposes of the Act.

When the summons came on to be heard in Chambers, a question was raised whether the estate limited to *Samuel Levy* by the settlement had not determined by reason of his insolvency in the colony, and Mr. Justice *Kay* directed that the summons should be served on a person who should represent those interested in remainder, and upon the Chief Commissioner or other official assignee of the insolvent estate of *Samuel Levy*, and that the summons when so served should be adjourned into Court. The summons, having been served as directed, now came on for hearing.

D. L. Alexander, for *Samuel Levy*, submitted that the insolvency in the colony did not affect his interest under the settlement, and that he was tenant for life within the meaning of the *Settled Land Act* of 1882, and entitled to make this application. Real estate in this country was governed by the law where it was situate, and the interest in it was not affected by orders made by a foreign Court. The insolvency in the colony did not divest *Samuel Levy* of his rights in the settled land, nor did the colonial statute extend to an interest either legal or equitable in land in this country. He referred to *Dicey* on Domicil (1); *Williams* on Bankruptcy (2); *Westlake* on Private International Law (3);

(1) Page 346. (2) 2nd Ed. p. 36. (3) Sects. 282, 283.

KAY, J. 1885 *In re* LEVY'S TRUSTS.

Foote on Private International Law (1); and *Cockerell* v. *Dickens* (2).

Solomon, for the remaindermen:—

The interest of *Samuel Levy* under the settlement was determined by his insolvency. By the comity of nations and the relation of the *United Kingdom* to her colonies, and by the operation of sect. 74 of the *Bankruptcy Act* of 1869, the colonial assignee by coming to the Courts in this country could obtain absolute possession of all the estate of the insolvent in this country whether real or personal. By the insolvency in the colony, the real estate of the insolvent situate in this country became vested in his assignee within the meaning of the words of the settlement. But even if that were not so, yet inasmuch as the Courts in this country would give effect to the insolvency as to such real estate, it would be "forfeited" within the meaning of the settlement. It was clearly settled that in the event of a bankruptcy in *England* the foreign Courts would recognise it and give assistance to the English Courts. In *In re Aylwin's Trusts* (3) a gift over of leaseholds on insolvency was held to take effect on the occasion of an insolvency in *Australia*, and *Waite* v. *Bingley* (4) shewed that an assignee in an insolvency in *Australia* might prove a transfer to him of the insolvent's real estate in *England*. He also referred to *Foote* on Private International Law (5); *Wheaton* on International Law (6); *Dommett* v. *Bedford* (7); *Barnett* v. *Blake* (8); *Townsend* v. *Early* (9); *In re Davidson's Settlement Trusts* (10); *Samuel* v. *Samuel* (11); *Lybbe* v. *Hart* (12).

The assignee in the insolvency in the colony did not appear.

D. L. Alexander, in reply:—

There could be no forfeiture within the meaning of the settlement until the assignee in the colony had actually obtained an

(1) Page 165.
(2) 3 Moo. P. C. 98; 1 M. D. & D. 45.
(3) Law Rep. 16 Eq. 585.
(4) 21 Ch. D. 674.
(5) Pages 161, 165.
(6) Sect. 80.
(7) 3 Ves. 149.
(8) 2 Dr. & Sm. 117.
(9) 34 Beav. 23.
(10) Law Rep. 15 Eq. 383.
(11) 12 Ch. D. 152.
(12) 29 Ch. D. 8.

order from the Court in this country vesting the estate in him. It was a matter for the discretion of the Court here to say whether it would or would not give assistance to the Court in the colony, and therefore it could not be said that the property was forfeited to the assignee in the colony, unless and until an order of the English Court had been made to that effect.

KAY, J.:—

This case comes on in a rather peculiar manner. An application was made in Chambers on behalf of *Samuel Levy* for the appointment of trustees of real estate of which it was alleged that he is the tenant for life, for the purposes of the *Settled Land Act*, 1882. The Court, looking at the provisions of the Act, required to have the persons entitled in remainder before it, and also required to have the assignee in the insolvency in *New South Wales* of the tenant for life served before an order could be made. I understand that all the parties are desirous to have the question, which arises under the settlement made in the year 1838, decided upon this application. [His Lordship read the words of the limitation in the settlement stated above, and continued:—] Then after any such event the property was to go over to other persons, and I have those persons represented on this hearing. It appears that on the 25th of October, 1875, *Samuel Levy*, being at that time resident and domiciled in *New South Wales*, was there made bankrupt, and the Act of the Colonial Parliament which relates to bankruptcy contains this provision:—[His Lordship read the section of the Act of the colony above stated, and continued:—] The words "wheresoever the same may be known or found" are wide enough to include the life interest in real estate in *England*, but it is quite obvious that the Act of the colonial Parliament does not vest real estate in *England* or real estate elsewhere than in the colony in the Chief Commissioner, or whoever occupies there the place of assignee in bank uptcy in this country. The English Act of Parliament which at that time applied to the case was the *Bankruptcy Act*, 1869, which contains a clause:—[His Lordship read sect. 74, and continued:—] From the facts before me I am bound to infer that if the Chief Commissioner, or the person who exercises the functions of what

KAY, J.
1885
In re LEVY'S TRUSTS.

used to be called the official assignee in *England*, had applied to the Court of Bankruptcy in *England* for an order in aid of the bankruptcy in the colony, to enable the assignee to receive the rents and profits of the property of which *Samuel Levy* is tenant for life during the rest of the life of *Samuel Levy*, that order would have been made as a matter of course. Therefore, on his becoming bankrupt in *New South Wales*, the real estate in this country became liable at once, or rather would have so become liable if it had belonged to him indefeasibly for his life, to be attached and taken possession of by the proper authority in *New South Wales* for the purposes of his bankruptcy there. Now, looking at the words of the provision which I have to construe, there being that liability to forfeiture which would have been inevitable if it had been possible for it to be put in force, does the case come within this clause or limitation? It is not a clause of forfeiture, but a clause by way of limitation, because the life estate is only limited to *Samuel Levy* until he commits an act of bankruptcy, whereupon a fiat in bankruptcy would issue. It seems to me that the word "fiat" there refers to bankruptcy in this country, and that the clause means an act of bankruptcy in this country. Then the words which follow, "or take the benefit, &c.," also seem to me to refer to the Act of Parliament of this country. But then the rest of the clause is [His Lordship read it]. Certainly, as it appears to me, this property did not become "vested" in any other person, but the question is whether it has not become "forfeited" to some other person. That depends on the meaning of the word "forfeited." The word "forfeit," the noun substantive, is defined in Dr. *Johnson's* Dictionary to be "something lost by the commission of a crime;—something paid for the expiation of the crime, a fine, a mulct." By the same authority the verb "to forfeit" is defined to mean "to lose by some breach of condition, to lose by some offence," and he gives certain illustrations, as usual, in his dictionary, and this is one: "A father cannot alien the power he has over his child; he may perhaps to some degree *forfeit* it, but cannot transfer it.—*Locke.*" There "forfeit" is contrasted with "alien or transfer." "Forfeit," the participial adjective, is defined to be "liable to penal seizure; alienated by a crime, lost either as to right or possession by

breach of conditions." Then he gives these lines from Shakespeare: "All the souls that were, were *forfeit* once; And He that might the vantage best have took, Found out the remedy." (*Measure for Measure.*) And, again: "Beg that thou may'st have leave to hang thyself; And yet, thy wealth being *forfeit* to the state, Thou hast not left the value of a cord."

Clearly the word "forfeit" means not merely that which is actually taken from a man by reason of some breach of condition, but includes also that which becomes liable to be so taken.

In this very sentence the word "forfeited" is contrasted with the words "vested in any other person." Therefore "forfeited" means something less than become "vested in any other person," and that shews that forfeited is used quite accurately as meaning liable to be taken from him. Why is not this property liable? If the Chief Commissioner had come to a Court of Bankruptcy in this country and asked its assistance to enable him to have possession of the fruits of the life interest in this real property, I see no other possible answer than that he would have obtained it at once. He did not come because the answer would have been that although, after what had happened, he would have been entitled but for this limitation, yet the moment the event happened the property became forfeited and passed over to other persons. It was only limited to the bankrupt until some event took place upon the occurrence of which it would be forfeited. That event took place, and at that moment the assignee lost all right to the order to which he would have been entitled if the property had belonged to the insolvent absolutely. I do not feel myself fettered by any of the authorities which have been cited; probably no authority could be cited which would be precisely in point. Here I have to determine the meaning of the words of the particular limitation, and I hold that the life interest in this property, upon *Samuel Levy* becoming bankrupt in *New South Wales*, was forfeited, that is, would have been liable to be taken from him if it had been an absolute life interest. It would be ridiculous to say that it was not forfeited because the forfeiture was not actually enforced, for then if the Chief Commissioner had actually come and asked for an order the property would have

KAY, J.
1885
In re LEVY'S TRUSTS.

gone over just because he did come and claim. Therefore it was that he did not come and ask for an order. My opinion is that *Samuel Levy* is not now entitled to any interest in the property, but that, in the event which happened—his becoming bankrupt in *New South Wales*—the property was forfeited and the limitation to him ceased, and by virtue of the limitation it went over to the persons next entitled.

Solicitors: *Lindo & Co.; Henry Harris.*

T. F. M.

In re DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

CHITTY, J.
1885
June 18.

[1885 M. 524.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, *sub-s.* ii., 37, 53—*Heirlooms—Sale—Application of Proceeds—Discharge of Incumbrances.*

The money arising by the sale, on the application of the tenant for life with the sanction of the Court, of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one.

ADJOURNED SUMMONS.

By settlement of the 14th of July, 1866, certain freehold hereditaments were assured and limited, subject to mortgages or incumbrances affecting the same, and subject to a term for securing payment of certain moneys, and to certain yearly rent-charges, from and after the death of the late Duke of *Marlborough*, to the use of the present Duke and his assigns during his life without impeachment of waste, and after his death to the use of his first and every other son successively according to their respective seniorities, and the heirs male of their respective bodies, with remainders over. The settlement contained the usual powers of sale and exchange of the freeholds thereby settled, with directions for investment of the proceeds of any sale in the purchase of lands to be settled to the same uses. The collection of pictures at *Blenheim* and other chattels, articles and effects which were treated as heirlooms were assigned to the trustees upon trust to allow the same to be used and enjoyed so far as the rules of law and equity would permit by the person or persons who, under the settlement, should, for the time being, be in the actual possession or in the receipt of the rents and profits of the freehold hereditaments, but so that the same should not vest absolutely in any person thereby made tenant in tail male by

CHITTY, J.

1885

In re DUKE OF MARLBOROUGH'S SETTLEMENT.

DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

purchase, unless such person should attain the age of twenty-one years, but the same should go, devolve and remain in the same manner as if they had been freehold hereditaments of inheritance and had been settled accordingly.

The applicant, the present Duke, succeeded to the title and the estates upon the death of his father in July, 1882, and has an infant son, the Marquis of *Blandford*, the first tenant in tail under the settlement.

Under orders made in Chambers on the application of the present Duke, three sets of pictures from the *Blenheim* gallery, being part of the chattels comprised in the settlement of 1866, had been sold, with the sanction of the Court, under the *Settled Land Act*, 1882, s. 37, for sums amounting to £185,000, which had been paid to the trustees of the estate. The last order for sale, made on the 3rd of February, 1885, contained an undertaking by the present Duke within one month to raise the question whether any part of the proceeds of the sale of the heirlooms could be properly reinvested so as to devolve as the settled real estate, and in the meantime not to direct any such reinvestment of the proceeds of sale now sanctioned, and to abide by any direction of the Court as to the reinvestment of the proceeds in the purchase of chattels upon the application of the trustees or guardian of the infant.

In pursuance of the undertaking this summons was taken out by the Duke for liberty to reinvest £68,550, part of the sum arising from sales prior to that sanctioned by the order of the 3rd of February, 1885, in the discharge of certain mortgages affecting the inheritance of freehold lands now subject to the trusts of the settlement of the 14th of July, 1866.

Macnaghten, Q.C., and *Phipson Beale*, in support of the summons:—

We submit that the proposed application of the proceeds of the heirlooms, which have been sold, in paying off incumbrances affecting the settled estates, is strictly within the provisions of the *Settled Land Act*, 1882, and ought to be sanctioned by the Court. By sect. 37, sub-sect. 1, a tenant for life, with the sanction of the Court, may sell personal chattels settled on trust so as to

devolve with land until a tenant in tail by purchase attains twenty-one, and (sub-sect. 2) the money arising by the sale "shall be capital money arising under this Act and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act," or may be invested in the purchase of other chattels which purchase (sub-sect. 3) shall not be made without an order of the Court. Then sect. 21 provides that capital money arising under the Act shall be applied (sub-sect. ii.) "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land."

Romer, Q.C., and *F. A. Lewin*, on behalf of the infant remainderman:—

We submit that the proposed investment is not within the powers of the Act; but even if it be it ought not to be sanctioned by the Court, as it will seriously prejudice the rights of the infant remainderman, who, if he attains twenty-one and dies before disentailing the property, will become absolutely entitled to the chattels, whereas, if the proceeds of sale are allowed to be sunk in the land by redeeming the incumbrances, all that he will get will be a tenancy in tail in lands of improved value and not the chattels or their proceeds absolutely. Sect. 34, which deals with the proceeds of leaseholds, expressly preserves the rights of remaindermen by directing that the proceeds are to be applied so as to give the parties interested in the money "the like benefit therefrom as they might lawfully have had from the lease, estate, interest or reversion in respect whereof the money was paid, or as near thereto as may be." The same rule ought to apply to the proceeds of chattels as to the proceeds of leaseholds; and that the interests of the remaindermen must be regarded is shewn by sect. 22, which provides (sub-sect. 5) that uninvested capital money arising under the Act "shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." Sect. 53

CHITTY, J. 1885 *In re* DUKE OF MARLBOROUGH'S SETTLEMENT. DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

also provides that a tenant for life shall, in exercising any power under the Act, "have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." The investment proposed by the tenant for life will so seriously interfere with the rights of the infant remainderman as to amount to a breach of trust, and as such cannot be sanctioned by the Court.

Ince, Q.C., and *Willis Bund*, for the trustees, took no part in the argument.

Macnaghten, in reply.

CHITTY, J.:—

This is an application relating to moneys which have arisen from the sale of chattels sanctioned by the Court under the *Settled Land Act*, sect. 37. The tenant for life asserts his right to have the money laid out in the discharge of incumbrances on the settled estates. It has been argued, however, for the remainderman, first, that there is no power to apply the money in the manner asked; and, secondly, that if there is such a power, and the tenant for life has it, the tenant for life is a trustee under sect. 53, and that it would be a breach of trust on his part, which the Court will not sanction, to have the money applied in discharging incumbrances affecting the land. The argument is based on this, that the settlement of the chattels, which is one of the ordinary kind, is such that the infant remainderman will, if he attains twenty-one, become absolutely owner of the chattels, and it is said, and rightly said, that if the money is applied in discharging the incumbrances upon the estates, which were settled by the same settlement, the result will be that the money will accrue to the persons taking under the settlement as a whole —that is to say, that the infant remainderman will, on attaining twenty-one, be only entitled to lands discharged from the incumbrances, to the extent that the money is properly applied, and that the result will be to alter the devolutions of the property. The contention of the remainderman as to the result and

effect of the transaction is correct. Now, the *Settled Land Act* certainly has made a very great alteration in the law. I would go so far as to say that it has created a revolution. Certainly it has displaced all those old ideas with regard to real estate to which conveyancers and judges and others were attached, by putting very extensive powers into the hands of a person who had previously only been looked upon as a usufructuary, viz., the tenant for life. The tenant for life has very extensive powers conferred upon him by this Act. Speaking for myself, when I have to deal with an Act of Parliament of this kind, I think the right way is to read the Act with great care, and not to approach it with a mind imbued strongly with the prejudices of old doctrine, and by means of such prejudices to cut down and impair the utility of the Act. To my mind it is the duty of the Court to give effect to the intention of the Legislature as shewn on the face of the Act of Parliament itself. The Act is an Act, not merely for "facilitating sales and leases and other dispositions of settled land," but also an Act "for promoting the execution of improvements thereon." The question before the Court turns mainly upon sect. 37. The power to sell personal chattels given by that section is not an absolute power. It cannot be exercised without an order of the Court, which has been obtained in this case.

Now the Legislature knew well that in settlements of land there are to be found settlements of chattels also, which settlements are so framed as to annex the chattels to the land so far as the rules of law and equity will permit of it, and those rules will not permit the devolution of the property beyond a tenant in tail by purchase, attaining twenty-one. That the Legislature was aware of that, and had that in mind is shewn by the express language of sect. 37. Beyond all question the primary intention of the settlors of chattels was to annex them to the land altogether, and make them follow all the devolutions. But that intention could not be lawfully carried into effect; the law of perpetuities stepped in—a peculiar law with regard to personalty as distinguished from realty, and therefore the settlements were made, as in this case, carrying the personalty with the land as far as could be.

CHITTY, J.

1885

In re DUKE OF MARLBOROUGH'S SETTLEMENT.

DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

[After reading sect. 37, sub-sect. 2, his Lordship proceeded :—] Now, to my mind it is plain upon that section that, having regard to sub-sect. 1, and contrasting it with sub-sect. 2, the Legislature had before it the very proposition, that the application of the proceeds of the sale of chattels under the other parts of the Act would in effect work a different devolution in point of title, because this second power, which is to invest in the purchase of other chattels, contains expressly the word "devolving," shewing that the chattels if bought are to devolve as the chattels sold, but in regard to the earlier part of the section the money which is to be treated as capital money arising under the Act is to be "paid, invested, applied, or otherwise in like manner in all respects as capital money arising under the Act." That brings me at once to sect. 2, sub-sect. 3, in which "land" is not defined, but "settled land" is. Passing to sect. 2, sub-sect. 9, "capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act." Sect. 21 provides how capital money arising under the Act is to be invested or otherwise applied. First, in the investment in Government or other securities, and then the capital would retain, so invested, the nature of personalty. Then (sub-sect. ii) "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land." Now what is the settled land with reference to this settlement? Why plainly, taking sect. 37 and applying it to this settlement, which is in the usual form, the settled lands are the freeholds with which the chattels devolve. That was plainly therefore one of the purposes to which the capital money arising from the sale of chattels might be applied. Then there are other purposes: (sub-sect. vi.) is "In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life." So far as that authorizes the purchase of the reversion in fee of leaseholds, held for years, there will be an alteration of the devolution in the title. Then, further, the money may be invested in the purchase of land in fee simple or of leasehold land held for sixty years. Again, money arising from the sale of freeholds may be invested in the purchase of long leasehold terms, and by sub-sect. xi "in any other mode in which money

produced by the exercise of the power of sale in the settlement is applicable thereunder." So far it seems to me to be unquestionable that the referential words in sect. 37, sub-sect. 2, viz., "paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act" would embrace the various modes of payment, investing, application, and dealing with money which are to be found in sect. 21. [His Lordship after referring to sect. 22, proceeded:—]

It is to my mind clear that a direction for the application of the money according to the terms of sect. 21 is to be made by the tenant for life in a case like this, where the money is not in Court. Some reliance was placed upon sect. 22, sub-sect. 5, on behalf of the infant remainderman. Capital money arising under this Act while remaining uninvested or unapplied is to be considered as land, and go to the same persons successively in the same manner, &c., as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement. That section has no application of course to the case where the money has been applied in the execution of any of the improvements. Sect. 21 may be taken in connection with sect. 25, which applies only to capital money before it is definitely laid out, and only to money, as I read it, which has arisen from lands, and would not apply to the case of chattels, because, in my opinion, sect. 37 is intended to be an exhaustive system of law in regard to them, except of course so far as there are in sect. 37 these words of reference carrying the Court to the other parts of the Act. Then sect. 34 was relied on, but that section does not apply to chattels which are sold. It deals, amongst other things, with leases for years, and is so framed as, when they are sold, to preserve the respective rights of the parties claiming under the settlement, but that has nothing to do with sect. 37 or with chattels which are sold. Now, up to this point it appears to me to be plain that the tenant for life has the right in such a case as this to require that the capital money which has arisen from the sale of the chattels shall be applied in discharge of incumbrances affecting the land settled, *i.e.*, the freehold land with reference to which the chattels are settled, and to which, so far as the law

CHITTY, J.
1885
In re DUKE OF MARLBOROUGH'S SETTLEMENT.
DUKE OF MARLBOROUGH *v.* MARJORIBANKS.

permits, the chattels have been annexed. Then comes sect. 53, on which it was argued that the tenant for life was a trustee of his power, and that it would be a breach of trust on his part to exercise this power so as in substance to defeat partially—because it is not wholly—the interest of the remainderman. The argument for the infant was really based upon this, that the tenant for life is not to have regard to the interest of all the parties interested under the settlement, looking at them as the head of the family would, but that he is to have regard to the peculiar interests of some particular person who takes in remainder. He ought to have regard, it was said, to the circumstance that if the money is thus applied the infant tenant in tail will, if he attains the age of twenty-one, become absolutely entitled, and, that being so, it would be inequitable and a breach of trust to prevent that absolute title from vesting. But it appears to me that the right view is that the tenant for life is to have regard to the interest of all parties. A good illustration of what was meant could be taken from a similar case to the present, which came before me in Chambers. A large landed estate in a state of bad cultivation, and producing low rents at the present time of agricultural depression (and it is well known historically that the agricultural depression brought about this Act of Parliament) is in the possession of a tenant for life under a settlement also comprising valuable pictures. The tenant for life is really unable to discharge his duties towards the land effectually. The rents are comparatively small; the rents have been reduced; the farm houses are getting out of repair; and there is a difficulty in finding anybody to take the property. In this state of things the tenant for life sometimes finds hanging on his walls pictures of very great value. Sometimes it happens that he does not care very much for pictures. There is a large and valuable property in the shape of heirlooms, and that can be converted into money. He obtains the sanction of the Court, and he turns them into money. Now, as the head of the family, and having regard to the interests of all parties under the settlement, would it be a breach of trust for him, within the meaning of this Act, and reading it fairly, to apply the moneys thus arising for the benefit of the settled land in improving the land, and doing the various

things which are mentioned in sect. 25, or in discharging the incumbrances, the interest of which in many cases greatly exceeds the rent or profit that is to be got from the land. It seems to me if he did that, that so far from it being fairly said that he disregarded, he would be really regarding the true interests of the persons entitled under the settlement. That is the case here, and I think that the application of the money arising from the chattels in the improvement of the land is just one of those things which the Legislature intended. I put the case of investments in improvements perhaps as a stronger one than that of discharge of incumbrances, but I think that to discharge the incumbrances which often carry greater interest than the rent, and therefore make a greater burden on the person who takes the land in succession, is an exercise of the powers with regard to the interests of all persons entitled under the settlement, although it may operate in some degree to the detriment of some particular person. I therefore hold that the tenant for life is entitled to do this.

MINUTE OF ORDER:—The Court being of opinion that the money in question may be laid out in the discharge of the mortgages affecting the inheritance of freehold lands now subject to the trusts of the settlement of the 14th of July, 1866, without keeping the charges alive: Order on summons accordingly.

Solicitors: *Spencer Whitehead*, for *Milward & Co., Birmingham; Hunters, Gwatkin, & Haynes.*

F. G. A. W.

CHITTY, J.

1885

June 13, 20, 30.

In re SIR J. RIVETT-CARNAC'S WILL.

Title of Dignity or Honour — Incorporeal Hereditament — Land — Heirlooms devolving with Dignity — Sale of Heirlooms — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10, *ss.* 37, 58—*Statute De Donis* (13 *Ed.* 1) —*Statute Westminster Second* [*Revised Ed. Statutes, vol. i., p.* 41].

A dignity or title of honour, as an incorporeal hereditament, is "land" within the meaning of the 37th section of the *Settled Land Act*, 1882.

When a dignity is limited to the heirs of the body, then, although no place be named in the creation of the title, the dignity is within the statute *De Donis*, and descendible as an estate tail, and the patent does not create a fee simple conditional.

There is no difference in these respects between a baronetcy and other descendible dignities.

The resolution reported 12 Rep. 81, *held* to be overruled.

The *Settled Land Act*, 1882, does not enable a limited owner to sell any property which, when vested in a tenant in fee simple, is by law inalienable.

Adjourned Summons.

Sir *James Rivett-Carnac*, late of *Rookcliffe House*, in the county of *Southampton*, who was created a baronet in 1836 by a patent which limited the dignity to him and the heirs male of his body without naming any place, by his will, dated the 12th day of August, 1843, gave and bequeathed the service of plate formerly presented to him by the inhabitants of *Bombay* to trustees upon trust to permit the same to be used and enjoyed as or in the nature of an heirloom, so far as the rules of law and equity would permit, by such heir male of his body for the time being as from time to time, under and by virtue of the letters patent granted to the testator by his late Majesty King *William* the Fourth, and the limitations therein contained, should have inherited and be actually entitled to his, the testator's, title and dignity of a baronet, but so nevertheless that no person who should be in the enjoyment of his said title and dignity should be entitled to a greater interest in the said service of plate than a life interest therein, until the expiration of twenty-one years after the decease of the survivor of all persons then *in esse* who by possibility might succeed to his said title and dignity. And the testator directed that the said service of plate should vest absolutely in such person

as at the expiration of twenty-one years after the decease of all persons then *in esse* who by possibility might succeed to his said title and dignity should be in the enjoyment of his said title and dignity, and that in case of the failure of issue of his body capable of inheriting his said title and dignity before the period therein-before prescribed for the absolute vesting of the said service of plate, the said service of plate should go to and absolutely vest as a transmissible interest in the person who should last have enjoyed his said title and dignity. The testator died on the 26th day of January, 1846, and on his death the baronetcy descended to his eldest son, the late Sir *John Rivett-Carnac*, Bart., who died on the 4th day of July, 1883, and on whose death the baronetcy descended to the applicant, Sir *James Henry Sproule Rivett-Carnac*, as being the eldest son of the late Sir *John Rivett-Carnac*.

At the time of the testator's decease there were three persons *in esse*, and no more, who could by possibility succeed to the baronetcy, that is to say, the testator's eldest son, the said Sir *John Rivett-Carnac*, his second son, *William John Rivett-Carnac*, who died on the 9th day of July, 1874, and his third son, *Charles Forbes Rivett-Carnac*, who was still living.

This was an application under the *Settled Land Act*, 1882, on behalf of Sir *James Henry Sproule Rivett-Carnac*, that the service of plate settled by the above-mentioned will might be sold under the direction of the Court.

It appeared from the evidence that the service of plate was of a massive description, and suitable only for use in a large establishment maintained at very considerable expense, and that there was no prospect of the applicant or his successor in the title ever being in a position to keep up such an establishment or to make any practical use of the plate, and consequently that when the plate should become vested absolutely in any person entitled under the will it would be sold, and that unless the sale thereof was now authorized by the Court, the plate would for more than a period of twenty-one years to come be a source of useless expense by reason of the necessity of paying for the housing and insurance thereof without being of any value whatever to any person.

CHITTY, J.

1885

In re SIR J. RIVETT-CARNAC'S WILL.

Macnaghten, Q.C., and *E. B. Michell*, in support of the application.

J. G. Wood, for the trustees of the will:—

The baronetcy was granted to Sir *James Rivett-Carnac* and the heirs male of his body in 1836, and he was not created a baronet of any particular place, and that being so, I submit that the baronetcy is not an incorporeal hereditament within the meaning of the *Settled Land Act*, 1882.

The present baronet is not tenant in tail of the dignity, or otherwise entitled to exercise the powers of a tenant for life within the meaning of the 58th section of the Act. The dignity was merely personal, and not within the statute *De Donis*, and consequently Sir *James Rivett-Carnac* took a fee simple conditional, and not an estate tail in the baronetcy, and on the birth of issue male he became entitled to the baronetcy in fee simple, for it has been held that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional and not an estate tail as he would have if a place had been mentioned, and this was adjudged in the case of a baronet (1).

Macnaghten, in reply:—

We submit that a dignity or title is an incorporeal hereditament within the meaning of sub-sect. 10 of sect. 2 of the Act of 1882.

The naming a place is not essential to the creation of a dignity. The case reported by Lord *Coke* (1) was overruled in the case of *Rex* v. *Knollys* (2), where *Holt*, L.C.J., says that naming a place is not essential to the creation of a dignity, and he mentions the Earldom of *Rivers* as an example. In *Earl Ferrers' Case* (3) it was held that a dignity, whether it be granted of a place or not, is a tenement within the statute *De Donis*, and is not forfeited on an attainder for felony.

A dignity or title of honour is not a chattel but a tenement, and titles of honour are real estate, because in ancient times such

(1) 12 Rep. 81. (2) 1 Ld. Raym. 10.
(3) 2 Eden. 373.

titles were annexed to the ownership of various lands, and were considered incorporeal hereditaments, wherein a person might have a freehold estate (1).

CHITTY, J.:—

The question is whether the present Baronet has under the 37th section of the *Settled Land Act*, 1882, power to sell the chattels with the sanction of the Court.

The chattels are personal chattels and are so settled as to devolve with the dignity "so as to vest in some person becoming entitled to an estate of freehold of inheritance in the dignity." The person in whom they will so far vest is not yet ascertained, but the present Baronet is entitled to enjoy them during his life.

The first point is whether a dignity which descends to the heirs general or heirs of the body is "land" within the meaning of the *Settled Land Act*, 1882.

By the 10th sub-section of the 2nd section of the Act it is enacted that in the Act "land" includes incorporeal hereditaments. Unquestionably a dignity which descends to the heirs general or the heirs of the body is in law an incorporeal hereditament, whether the dignity does or does not concern lands or a certain place. The enactment is absolute and without any qualification, such, for instance, as occurs in the interpretation clauses of the 3 & 4 Will. 4, c. 27, c. 74, c. 106, and other Acts of Parliament. No sufficient reason can be adduced from the other parts of the Act for cutting down the well-known legal meaning of the technical term "incorporeal hereditaments," and I consider that I am not at liberty by implication or otherwise to introduce any qualifications modifying the clear and unambiguous language of the interpretation clause; a consideration of the 37th section of the Act of 1882, so far from suggesting any fair ground for restricting the meaning of the term "incorporeal hereditaments," affords reasons for giving full effect to the term. The section is an isolated enactment relating to personal chattels in an Act primarily dealing with land. The enactment was

(1) *Williams* on the Law of Real Property, 3rd Ed. p. 8; *Cruise*, Digest, vol. iii. p. 145.

CHITTY, J. 1885 *In re* SIR J. RIVETT-CARNAC'S WILL.

passed to remedy the mischief which arose in *D'Eyncourt* v. *Gregory* (1), where it was decided that the Court had no jurisdiction, either under the *Settled Estates Act* or otherwise, to order or sanction the sale of settled personal chattels, notwithstanding that in the circumstances of the case no benefit was being derived, or in all probability would be derived, from the chattels by any of the persons interested. The chattels in that case consisted of furniture of great magnificence, and were not only wholly unsuited to the mansion-house, but were of such magnitude that the mansion-house would not hold them, and they had to be stored away in a barn. It was necessary to obtain a private Act of Parliament authorizing the sale, and this was subsequently obtained on a bill sanctioned by the Court, and, of course, at considerable expense to the persons interested. It seems to me that the mischief is the same whether the chattels are annexed by the settlement to land or to a dignity, the sanction of the Court being in either case required as a protection against a sale not justified by the circumstances. In the case before me no question has been raised, or could properly be raised, as to the propriety of a sale of the chattels. They consist of a valuable service of plate. The greater part of the plate is of a massive description, and suitable for use only in a large establishment maintained at considerable expense. There is no prospect that the present Baronet or his immediate successors will ever be able to keep up such an establishment or to make any practical use of the plate. It is now stowed away in the strong room of a bank, and it will probably remain there for years to come, useless to the persons interested, and at an expense for storing and insurance.

As a reason for cutting down the meaning of the term "incorporeal hereditaments," it was objected that if the term was held to include a dignity then the present Baronet would be entitled to sell the baronetcy itself. But the answer to this objection is obvious. The Act only confers on tenants for life, or other limited owners, a power of sale and other powers possessed by an absolute owner; and it does not make saleable or alienable that which in its nature is unsaleable and inalienable.

It occurred to me during the argument whether a purely

(1) 3 Ch. D. 635.

personal annuity granted to a man and his heirs general, or to a man and the heirs of his body, would be within the Act. The question is of little or no practical importance, because the grant of such an annuity at the present date rarely if ever occurs; and I certainly have never seen or heard of a settlement annexing personal chattels to any such annuity. I leave the question for decision if ever it should be raised—but with the following observations. Such an annuity is not within the statute *De Donis*, and consequently where it is limited to a man and the heirs of his body, he takes a fee simple conditional which becomes absolute on the birth of issue. And in such a case the grantee can alienate the annuity, as appears from the case of *Earl of Stafford* v. *Buckley* (1), and the case of *Turner* v. *Turner* (2). For such a case, or for the case of a grant to heirs general (to which the power of alienation is of course incident) there was no need of a statute conferring powers of sale and the like.

The next point is this: it is said that the present Baronet is not tenant in tail of the dignity, or otherwise entitled to exercise the powers of a tenant for life, within the meaning of the 58th section. It appears from the patent granted in 1836 to Sir *James Rivett-Carnac*, and the heirs male of his body, that he was not created baronet of a place. Hence it was argued that the dignity was merely personal, and not within the statute *De Donis*; and consequently that Sir *James Rivett-Carnac* took a fee simple conditional and not an estate tail in the baronetcy; and accordingly that on the birth of issue male he became entitled to the dignity in fee simple. This chain of reasoning depends on a resolution reported by Lord *Coke* (3) to have been come to by the two Chief Justices, the Chief Baron, and the Attorney and Solicitor-General. This was obviously a mere statement of the opinion of those learned persons, and not a judicial decision. Its authority was overruled in *Rex* v. *Knollys* (4) and in *Earl Ferrers' Case* (5), where it was held that a dignity, whether it be granted of a place or not, is a tenement within the statute *De Donis*, and consequently is not forfeited on an attainder for felony. It was in reference to

(1) 2 Ves. Sen. 170.
(2) 1 Bro. C. C. 316, 325.
(3) 12 Rep. 81.
(4) 1 Ld. Raym. 10.
(5) 2 Eden. 373.

CHITTY, J. 1885 *In re* SIR J. RIVETT-CARNAC'S WILL.

Knollys' Case (1) that Lord *Holt* made his celebrated answer before the Committee and at the Bar of the House of Lords, when he declined, as there was no writ of error depending before the House, to give the reasons for a judgment delivered in a Court of law. In *Earl Ferrers' Case* (2) the elaborate argument of *Parker*, C.B., upon the effect of the attainder was adopted by the Lord Keeper, and the rest of the Lords concurred or acquiesced in the opinion of the Lord Keeper, and the then Earl *Ferrers* took his seat in Parliament as Earl *Ferrers*, notwithstanding the attainder of his ancestor for felony. So that, in the language of the reporter, the point was then settled by the highest authority.

These decisions that a dignity though not granted of a place is a tenement within the statute *De Donis*, confirm the conclusion at which I have arrived, that such a dignity is an incorporeal hereditament within the *Settled Land Act*.

I therefore make the order.

Solicitors: *H. A. Graham; A. F. & R. W. Tweedie.*

(1) 1 Ld. Raym. 10. (2) 2 Eden. 373.

G. M.

NICOL *v.* NICOL.

NORTH, J.

1885

June 6, 8.

[1884. N. 588.]

Husband and Wife—Separation Agreement—Reconciliation.

A husband and wife when before the Divorce Court agreed that if judicial separation was decreed the wife should be permitted to enjoy during her life certain furniture. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation:—

Held, in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed:

Held, that, as the wife was entitled to the furniture during separation only, she took nothing under 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by a wife during separation.

On the 26th of February, 1880, an action by Mr. *G. G. Nicol* against Mrs. *Nicol* for judicial separation upon the ground of cruelty on her part came on for hearing. By consent the jury was discharged, and the parties agreed that the case should be heard by the Judge, and they signed an agreement: "If judicial separation decreed, following terms to be agreed upon:—Mrs. *Nicol* to be permitted to enjoy during her life the use of all furniture and all the articles of every kind and description now in No. 7, *Chichester Terrace, Brighton*, with full right to remove the same elsewhere in *Great Britain*. After her death same to revert to Mr. *Nicol*, or his representatives." There were provisions for taking an inventory, and for Mrs. *Nicol* quitting the house, and taking another if she chose; and that her right to enjoy the furniture was subject to the condition that she was not to interfere with or annoy Mr. *Nicol;* and there were other provisions which did not affect the question. Judicial separation was decreed. The furniture was placed in the possession of Mrs. *Nicol*, who afterwards moved to another house in *Brighton*. In February, 1882, she went to reside with her husband under circumstances which, in the opinion of the Court, shewed as strong a case of reconciliation and renewal of cohabitation as well could be. In July following they again separated. Mrs. *Nicol* had considerable property besides.

NORTH, J.

1885

NICOL v. NICOL.

Mr. *Nicol* had taken possession of the furniture, and Mrs. *Nicol* brought this action to recover possession of it.

Hilbery, for Mrs. *Nicol*:—

Three questions arise: first, whether any interest passed to Mrs. *Nicol* under the agreement; if so it cannot be avoided according to 20 & 21 Vict. c. 85, s. 25; Secondly, whether the agreement came to an end on recohabitation; thirdly, whether what took place amounted to recohabitation. On the first point, the word "property" in the Act has the widest meaning and includes such an interest as this, which then cannot be destroyed by recohabitation: *Wood* v. *Manley* (1); *Johnson* v. *Lander* (2); *In re Insole* (3); *In re Coward and Adam's Purchase* (4). On the second point, there is no absolute rule that recohabitation puts an end to an agreement on separation, as that must depend on the intention of the parties. But if there is such a rule the words "during her life" prevent its application here: *Randle* v. *Gould* (5); *Wilson* v. *Mushett* (6); *Charlesworth* v. *Holt* (7); *Fletcher* v. *Fletcher* (8); *Bateman* v. *Countess of Ross* (9); *Webster* v. *Webster* (10); *Marquis of Westmeath* v. *Marchioness of Westmeath* (11).

Barber, Q.C., and *Hadley*, for Mr. *Nicol*:—

The agreement as to the furniture was only to last during the separation, and came to an end when they resumed cohabitation. Of course there may be an agreement upon a separation which would not in all its parts end on recohabitation, but this agreement is simply to extend to the time of separation, and the words "during her life" are properly used, and are subject to that limitation. The Act 20 & 21 Vict. c. 85, does not include property coming in this way.

Hilbery, in reply:—

The furniture is expressly to be hers during her life and

(1) 11 Ad. & E. 34.
(2) Law Rep. 7 Eq. 228.
(3) Ibid. 1 Eq. 470.
(4) Ibid. 20 Eq. 179.
(5) 8 E. & B. 457.
(6) 3 B. & Ad. 743.
(7) Law Rep. 9 Ex. 38.
(8) 2 Cox, 99.
(9) 1 Dow, 235.
(10) 4 D. M. & G. 437.
(11) 1 Dow & C. 519.

without any reference to separation or reconciliation: *Crouch* v. *Waller* (1). *Hindley* v. *Marquis of Westmeath* (2) simply decided that a deed contemplating a future separation is void.

NORTH, J.:—

In this case a question arises as to the effect and meaning of an agreement made under the sanction of the Judge of the Divorce Court at a time when an action by the husband against the wife for a judicial separation on the ground of cruelty by the wife to the husband was being tried. [His Lordship then read the agreement, and stated what had been subsequently done as to the furniture, and as to the reconciliation.]

The question then, is, what is the effect of such reconciliation and recohabitation upon the instrument of separation.

Now, as regards that, I think it clearly established by numerous authorities (no case in any way conflicting with them), that where a separation arrangement is made pure and simple, that arrangement is for the term of the separation, and for no longer. It comes to an end when the separation ends, not because the fact of reconciliation or recohabitation makes it void, but it dies a natural death. The agreement was to provide for a state of things which has come to an end, the state of things being that the parties were living separate although married. When they live together again as man and wife the state of things is totally different, and the arrangement comes to an end. But of course it may be the case that the terms of an arrangement may not form merely a deed of separation, but may have a much wider scope. The parties may in terms say, that the arrangement made is not to be operative during separation only, but shall continue during the lives of the parties whether there is a reconciliation or not. Of course, if they do that, the deed is not simply what is generally called a separation deed, but it is a resettlement, or a settlement going further than a separation deed pure and simple. The question here is, whether this is really an arrangement providing simply for what was to occur during the period of separation, or an arrangement which was intended to be permanent during the lives of the parties, whether

(1) 4 De G. & J. 302. (2) 6 B. & C. 200.

NORTH, J. 1885 NICOL v. NICOL.

reconciliation did or did not take place. [His Lordship then read parts of the agreement, commenting especially on the fact that the furniture was provided for the personal use and enjoyment of Mrs. *Nicol*.] Looking at that agreement as a whole, it seems to me clear that it was intended to operate during separation, and not for a longer time. That is the view which I take on the terms of the agreement by itself, and independently of authority. But then the argument is, that in the present case upon two grounds the Plaintiff is entitled to succeed; first of all, upon the ground that the words "during her life" give the Plaintiff the right to the furniture until she dies; and, secondly, that the 25th section of the *Divorce and Matrimonial Causes Act* does so.

With respect to the words "during her life," they of course might extend, and even upon the construction I put upon the deed would extend, to the termination of her life, because probably it was not contemplated at the time when the agreement was entered into that the parties might come together again, having regard to the circumstances under which they separated. Therefore those words "during her life" do not seem to me by any means decisive in her favour. They are words which I should have expected to find even if the agreement was expressly to come to an end upon recohabitation, although no doubt it might have been made clearer if it had said "during her life or until earlier determination of the agreement." But I do not think that the words "during her life" are, as I find them, in any way conclusive.

It is said there has been some adjudication upon those words in *Randle* v. *Gould* (1), and that that adjudication has been acted upon by the Lord Chancellor in the later case of *Crouch* v. *Waller* (2). [His Lordship then stated the facts of the former case as reported.] The Court said (3):—"This cohabitation clearly does not avoid the deed under the express proviso. The question then arises, whether a deed so framed is impliedly avoided by such cohabitation. The express proviso intimates the intention of the parties to have been that the deed should remain in force

(1) 8 E. & B. 457. (2) 4 De G. & J. 302.
(3) 8 E. & B. 468.

notwithstanding cohabitation, unless the cohabitation was according to the stipulated formalities, and for the stipulated period of time, the wife being left at liberty, without endangering the provision intended for her, to make an experiment whether she could with safety and comfort cohabit with her husband." If the judgment had stopped there the case of course would have been totally different from the present, but then the Court went on to express a second reason for deciding as it did. Mr. *Barber* calls it an *obiter dictum*. I do not feel at liberty to say it is so. It is one of two grounds which are given by the Court as sufficient reasons for deciding the case as it did; and I do not see how I can say that one of those more than the other is an *obiter dictum*, or that both are *obiter dicta*, although either reason, if it stood alone, would have been sufficient for the conclusion which the Court came to. The Court went on to say (1), "But, if there had been no express proviso for avoiding the deed in a certain manner, we are of opinion that, looking to the whole scope of this deed, the covenant to pay the weekly allowance would not have been avoided by the reconciliation and cohabitation of the husband and wife. It is not merely an allowance to her while she lives separate from her husband: it was absolutely to be paid to her by way of a provision during the term of her natural life, not being suspended or reviving as she should live with him or leave him. It is therefore a post-nuptial settlement upon her by her husband, holding out no temptation to her to separate from him; and it is as little liable to exception as a covenant to pay pin money in a regular marriage settlement. *Jee* v. *Thurlow* (2), *Wilson* v. *Mushett* (3), and *Webster* v. *Webster* (4) are express authorities in support of the view we have taken of this case." The Court says it has come to that conclusion upon the deed in that case. The deed is not fully set out, but I do not find anything there at all corresponding with the various provisions in the present agreement. There is no doubt the phrase "during her life" in each of the two cases, but the reasons which lead me to consider in the present case that the phrase "during her life" has the meaning I have given to it, rest upon the construction of a document

(1) 8 E. & B. 468.
(2) 2 B. & C. 547.
(3) 3 B. & Ad. 743.
(4) 4 D. M. & G. 437.

NORTH, J.
1885
NICOL
v.
NICOL.

containing terms totally different from anything in that case. That case again is stated to proceed upon three cases as express authorities. *Webster* v. *Webster* (1) was one, and there, as I read it, the opinion of the Court is clear that the words "during her life" were not sufficient of themselves to give the wife an interest after the deed was put an end to by recohabitation. The facts were very shortly these:—[His Lordship then stated the facts.]

If the words "during her life" had given the wife in that case an interest down to the time of her death, notwithstanding the renewal of cohabitation, the question to be decided could never have arisen at all; but it is also clear that neither the counsel who argued the case, nor Lord Justice *Knight Bruce*, nor Lord Justice *Turner*, who were familiar with questions of this kind, considered that the fact that an interest was given to her during her life could extend her right to have it till the end of her life if recohabitation had taken place. I do not stop to read the judgments, but that case seems to me to shew clearly that the words "during her life" taken alone were not held sufficient to extend it to the end of her life notwithstanding recohabitation; and therefore it is not in any way an authority for the second point decided by the Court of Appeal in *Randle* v. *Gould* (2). With regard to the first point, that case has no bearing upon it, because the first point turned upon the special language of the deed, which is not common to the cases cited.

Two other cases were cited, one of them being *Wilson* v. *Mushett* (3). In that case there was a deed made upon a separation between the parties, and the deed contained the clause stated in the judgment of Lord *Tenterden*. He says this (4): "One proviso of the deed is, that if the defendant and his wife shall thereafter agree to cohabit again, such cohabitation shall in no way alter the trusts thereby created, but they shall stand valid, and of as full effect to all intents and purposes, as well during such cohabitation, as in case they again live separate." He then said: "And it is said that this is inconsistent with other parts of the instrument of separation. But I do not see the objection." There was in that case an express provision that the deed should

(1) 4 D. M. & G. 437.
(2) 8 E. & B. 457.
(3) 3 B. & Ad. 743.
(4) Ibid. 751.

continue and not stop, even although cohabitation was renewed. This was clearly legal, and in no way against the policy of the law; and there was no reason why full effect should not be given to it, there being no rights of creditors or anything of that sort to interfere with the intention of the parties as so expressed; and it was in fact, so far as regards the provision during the time the parties were apart, a separation deed; but so far as it provided for what was to take place afterwards, it was not a separation deed but a further settlement.

The other case is *Jee* v. *Thurlow* (1); but that really is a case wholly distinct both from the other cases and from this case. There the parties agreed to live separate, and the husband covenanted to pay an annuity to his wife during so much of her life as he should live, the trustee was to indemnify the husband against the wife's debts, and she was to release all claim of jointure, dower, or thirds. It was held that the deed was legal and binding, and that the fact of the wife afterwards having taken proceedings in the Ecclesiastical Court for a restitution of conjugal rights, the result of which was that a divorce was granted, did not put an end to the covenant in the deed that the annuity was to be paid during the joint lives. If in that case there had been a recohabitation, then, indeed, the point I have to deal with and the point dealt with in *Randle* v. *Gould* (2) might have arisen; but, inasmuch as no recohabitation took place, the only point decided was that the ultimate granting of the divorce after the separation had taken place was not sufficient in itself to release the husband from the covenant entered into to pay the annuity. Those three cases therefore do not seem to me to carry *Randle* v. *Gould* any further as regards the point I have to deal with, and I must say, comparing that decision with *Webster* v. *Webster* (3), the latter case being a decision of the Court of Appeal, if I had to choose between the two I should certainly prefer to follow the decision in the latter case.

Then there is the case of *Crouch* v. *Waller* (4). In that case a separation had taken place, and the wife's mother brought an action against the husband for necessaries supplied to the wife.

(1) 2 B. & C. 547.
(2) 8 E. & B. 457.
(3) 4 D. M. & G. 437.
(4) 4 De G. & J. 302.

NORTH, J.
1885
NICOL
v.
NICOL.

The matter was referred to arbitration, and under that reference a deed was executed with a warrant of attorney, under which an annuity was to be made payable to the wife for her separate use "during her life." There was a second deed in that case, and one of the arguments was that the two deeds were to be read together, and that, inasmuch as the second deed contained provisions which could not be enforced, therefore the two deeds were coupled together, and must stand or fall together. The Court took a different view; it held that the deeds must be read separately, and that the deed in that particular case was one under which the provision created by it was not only during the separation but was intended to be during the life of the wife whether the parties came together or not, and the Lord Chancellor points out in his judgment the reason for it. He says (1): "The annuity is given to the plaintiff absolutely for her life, and there is no stipulation that it is to cease upon future cohabitation. On the contrary, such an event seems to be contemplated in the provision which the deed makes of an annuity for present and future children, and also for the application of the rents and profits after the death of the husband and wife 'to the children born or to be born.'" That case therefore is wholly different from the present, and the decision proceeded on the fact that there were words pointing to the continuance of the annuity after the parties had lived together again. Then the Lord Chancellor says this: "I may say with the Court in *Randle* v. *Gould* (2) 'it is not merely an allowance to her while she lives separate from her husband; it was absolutely to be paid to her by way of a provision during the term of her natural life, not being suspended or reviving as she should live with him or leave him.'" Now that is adopting the phraseology of that case as applied to the case before him: but it is not any expression of opinion as to the second ground of decision in *Randle* v. *Gould*. The decision in *Crouch* v. *Waller* (3) therefore does not interfere with the view that I take; and besides, I must say again, as I said before, that my view of the agreement to be dealt with here is that it contains provisions totally different from those in the cases which have been cited to me, all pointing to this, that a

(1) 4 De G. & J. 313. (2) 8 E. & B. 469.
(3) 4 De G. & J. 302.

separation was contemplated to continue during the life of the parties; and that what was within their contemplation and intention was the duration of the separation, and not a settlement which was to continue during the separation and afterwards. I see no trace whatever from beginning to end of any intention to settle the furniture after the separation came to an end, and I do not believe for a single moment that anyone thought there was any chance of the separation coming to an end.

The only other point is the construction of the 25th section of the *Divorce and Matrimonial Causes Act*, 20 & 21 Vict. c. 85. The provisions of that section are these: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

Now, the first question is whether it can be said that this furniture was property of any description, which she might acquire, or which might go to or devolve upon her during separation. I am not prepared to say that the interest she acquired in this furniture was not such property. Mr. *Barber* contends that it was not. I think that her interest in this furniture was such as would come within this section; but what is the result of the section? What the section says is this, that whatever property she acquires is to be disposed of by her as a *feme sole*, on her death to go as if her husband was dead, if she again cohabits with the husband it is to be held for her separate use; that means that if it is property capable of being so held it shall as between herself and her husband be so held, but it does not mean that if anything is given to her for her life only, that is to go to her representatives after her death. The section does not enlarge her

NORTH, J. 1885 NICOL v. NICOL.

estate in any way, it is merely to secure her having what the limitation in her favour gives her; and considering, as I do, that the agreement gives her the enjoyment of the furniture during the separation and no longer, as soon as the separation comes to an end there is nothing left on which this clause could operate.

Under those circumstances the action fails and must be dismissed with costs.

Solicitors for Plaintiff: *Campbell, Reeves, & Hooper.*
Solicitors for Defendant: *Tyrrell Lewis & Co.*

C. M.

In re DELTA SYNDICATE, LIMITED. *Ex parte* FORDE.

PEARSON, J.

1885

May 15.

Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628]—*Paid-up Shares—Numbers of Shares.*

A contract to issue fully paid-up shares for a consideration other than money, registered under the *Companies Act*, 1867, s. 25, need not specify the numbers of the shares.

THE *DELTA SYNDICATE, LIMITED*, was registered on the 21st of April, 1884, for the purpose of uniting into one body the shareholders and bondholders of two companies.

Mr. *Henry Charles Forde* was the holder of ten bonds of the nominal value of £100 each of the *Société Industrielle Agricole*, a French company, and one of the two companies referred to above. In answer to a circular, inviting him so to do, he filled up and signed and sent to the directors of the *Delta Syndicate, Limited*, a printed application for fully paid-up shares in the *Delta Syndicate, Limited*, in exchange for the surrender of his debentures, which, together with a form of acceptance subsequently filled up on behalf of the company, was as follows:—

"Gentlemen,

"I undertake and hereby assent to the surrender of my debentures or bonds for £1000 nominal of the *Société Industrielle Agricole du Delta du Nil*, particulars whereof are undernoted, in consideration for shares of the same nominal amount to be allotted to me fully paid-up; and I consent to and request that this application, which if accepted on behalf of the company in terms as at foot, will constitute a contract to be registered as and for a contract pursuant to the 25th section of the *Companies Act*, 1867, and this my application for such shares is conditional upon this contract being registered prior to the allotment of such shares to me.

"The bonds held by me are for £100 each, and are Nos. 283 to 292.

"Name in full: *Henry Charles Forde.*

"Address: 7, *Pope's Head Alley, London*, E.C.

"Profession or occupation: Civil Engineer.

"Signature, *Henry C. Forde.*

PEARSON, J.
1885
In re DELTA SYNDICATE, LIMITED. *Ex parte* FORDE.

"The company hereby accept the above debentures, and agree to allot in consideration thereof to the above-named

"Shares No. to in the *Delta Syndicate, Limited.*

"Dated 24th day of Nov., 1884.

"For the *Delta Syndicate, Limited.*

"*Fred Walters*, Vice-Chairman.

"*George Forbes*, Secretary."

On the 22nd of October, 1884, a resolution was passed at a meeting of the directors of the *Delta Syndicate, Limited*, authorizing "Mr. *Frederick Walters*, as vice-chairman, to sign on behalf of the company the contracts necessary to be registered, pursuant to the 25th section of the *Companies Act*, 1867, at the foot of the applications for shares in exchange for bonds of the *Delta du Nil Company, Limited.*"

On the 26th of November, 1884, Mr. *Forde's* application, with a number of other such applications, having been duly stamped and signed by Mr. *Walters*, was registered at the Joint Stock Companies' Registry Office in pursuance of sect. 25 of the *Companies Act*, 1867, but no numbers to particularise the shares were filled in.

A letter of allotment was subsequently sent to Mr. *Forde*, and a certificate of shares in the *Delta Syndicate* was sent to him in exchange for his bonds of the *Société du Delta du Nil*, and his name was placed on the register of shareholders of the *Delta Syndicate.*

This was a motion under sect. 35 of the *Companies Act*, 1862, to rectify the register of shareholders of the *Delta Syndicate* by striking out the name of Mr. *Forde*, on the ground that the document registered as a contract did not specify the numbers of his shares, and did not therefore satisfy the provisions of sect. 25 of the *Companies Act*, 1867, and were not therefore the fully paid-up shares he applied for.

There were a large number of other shareholders in the same position as Mr. *Forde.*

Cookson, Q.C., and *Phipson Beale*, for *Forde*:—

A contract proper to be registered under the 25th section of the Act of 1867, must specify the numbers of the shares to be

allotted in pursuance of such contract, so that any one, looking at the register of shareholders, may connect the shares claimed to be held as fully paid-up with those specified in the registered contract: *Crickmer's Case* (1); *Pritchard's Case* (2).

The test laid down by *Mellish*, L.J., in *Fothergill's Case* (3) is whether a plea of money payment, or a plea of accord and satisfaction, can be raised.

Cozens-Hardy, Q.C., and *Stirling*, for the company:—

All that the Act requires is that a contract be registered; the specification of the numbers of the shares is not necessary to the validity of a contract to issue shares. In *Hartley's Case* (4) the shares were not numbered.

Cookson, in reply.

PEARSON, J.:—

I am not sure that I do not agree to a certain extent with the argument of Mr. *Cookson*: that is to say, that it would probably have been better, and would have more effectively carried out the intention of the Legislature, if the 25th section of the Act of 1867 had been fuller, and required the numbers of shares to be specified. But I cannot find a provision to that effect in the Act: and I have no right to make the burden on the company or the shareholder more onerous than the Legislature has made it. The simple question is whether or not the blank left in the contract avoids the contract, and makes it fraudulent under the Act of 1867. I come to the conclusion that it does not. There is nothing in the Act which requires the shares to be numbered, there is nothing expressed in the Act, and nothing in the decisions on the Act which requires the numbers to be stated. And from the passage cited from the judgment of *Mellish*, L.J., I certainly should come to the conclusion that *Forde* would be able to plead accord and satisfaction, and upon such documents as those before me would be able to establish that plea. I think there is nothing here which contravenes the Act

(1) Law Rep. 10 Ch. 614.
(2) Ibid. 8 Ch. 956.
(3) Law Rep. 8 Ch. 270.
(4) Ibid. 10 Ch. 157.

PEARSON, J. 1885 *In re* DELTA SYNDICATE, LIMITED. *Ex parte* FORDE.

in express words, and there is nothing which I ought to hold contravenes the Act. I think a proper contract has been registered, and that Mr. *Forde* is in no peril whatever. And I shall refuse this motion, but as it is in the nature of a representative case without costs.

Solicitors: *Blunt, Tebbs, & Lawford; Druces, Jackson, & Attlee.*

D. P.

PEARSON, J. 1885 *June* 19.

STREET *v.* UNION BANK OF SPAIN AND ENGLAND.

[1885 S. 1880.]

Jurisdiction—Injunction—Trade-name—Telegraphic Address.

The short address "*Street, London,*" was used for many years in sending telegrams from abroad to *Street & Co.* of *Cornhill.* A bank adopted by arrangement with the Post Office the phrase "*Street, London,*" as a cypher address for telegrams from abroad to themselves:—

Held, that the Court had no jurisdiction to restrain the bank from using such cypher address.

THE Plaintiffs in this action were *Edmund Street* and *George Jackson,* trading as *Street & Co.* They carried on the business of advertising agents at *Cornhill,* and at a branch office at *Carey Street, Lincoln's Inn Fields.* The Plaintiffs claimed an injunction to restrain the Defendant bank from using, or representing that they were entitled to use, for their abbreviated telegraphic name and address the expression "*Street, London,*" and from receiving, opening, or retaining any telegrams addressed "*Street, London,*" and from representing that they were carrying on business under the name of *Street, London,* or that they were entitled to use in any way for the purpose of or in connection with their business the expression "*Street, London.*"

There was evidence on the part of the Plaintiffs that they had used as an abbreviated telegraphic name and address the expression "*Street, London*" ever since communication by telegram was invented, and that a large number of foreign telegrams so addressed were sent to them. That frequently during the end of the year 1884 and the beginning of the year 1885 foreign

telegrams had been sent to the Plaintiffs' firm, and had been sent elsewhere and been delayed in transmission, that it was of the utmost consequence in their business that foreign telegrams should be punctually received, and instances were adduced where the Plaintiffs were exposed to loss and liability and their customers had suffered damage on account of their foreign telegrams, directed *Street, London*, having been sent to the Defendant company; and the Plaintiffs were universally known abroad as "*Street, London.*"

The Postmaster-General, *London*, keeps a register of cypher addresses, for registering in which he requires an annual registration fee of £1 1*s*. On the 10th of January, 1882, the Defendant bank, in accordance with the rules of the General Post Office, registered the address "*Street, London*," and have ever since kept that address on the register, and their foreign correspondents have telegraphed to them by that address.

This was a motion for an interim injunction in accordance with the Plaintiffs' claim.

Cookson, Q.C., and *Seward Brice*, for the Plaintiffs:—

The Plaintiffs have acquired the right to the exclusive use of "*Street, London*," as their trade-name and address for the purpose of foreign telegrams. The user of that name by anyone else for the purpose is an interference with the Plaintiffs' trade that the Court will not allow.

Everitt, Q.C. (*Latham*, with him), for the Defendants:—

The foundation of the jurisdiction to prevent the use of a trade-name by a stranger is fraud. In this case there is no fraud, no attempt by the Defendants to obtain any advantage out of the Plaintiffs' name. They do not represent themselves to anyone to be the Plaintiffs. If any loss or inconvenience has happened to the Plaintiffs from the acts of the Defendants, it is not actionable, it is *damnum absque injuriâ: Day* v. *Brownrigg* (1).

[He was stopped by the Court.]

Cookson, in reply.

(1) 10 Ch. D. 294.

PEARSON, J. PEARSON, J. :—

1885

STREET v. UNION BANK OF SPAIN AND ENGLAND.

I regret that I am obliged to decide this case against my inclinations. [His Lordship stated the facts and proceeded:—] The necessary result followed that there has been some confusion and inconvenience, telegrams intended for *Street & Co.* have gone to the *Union Bank of Spain and England*. *Street & Co.* complain that the bank, who have occasioned that inconvenience, have done that which is unlawful, because they have adopted this address, which was their property, and which they alone have the right to use. I am unable to come to that conclusion. "*Street, London,*" is not the name and address of the Plaintiffs' firm. Their proper address is, "*Street & Co.*, 30, *Cornhill, London.*" And the act which caused the inconvenience was not one intended in any way to injure the trade of Messrs. *Street & Co.*, nor are the *Union Bank of Spain and England* in using the address, "*Street, London,*" representing themselves to be *Street & Co., Cornhill,* or as carrying on a business in any way like that of *Street & Co.*, or doing anything which will in any way attract the business of *Street & Co.* In fact the businesses of the two firms are so unlike that it is quite impossible that one firm can attempt to take away the business of the other. All that the Court is asked to prevent is merely inconvenience. Has this Court any right or jurisdiction to interfere in a case of that kind? Is it not a case completely outside the jurisdiction, and a case which ought to be settled between the parties, and left to them to obviate the inconvenience which must arise to one or the other? To my mind, the *Union Bank of Spain and England* has done nothing unlawful. The Post Office is not bound to deliver telegrams and letters imperfectly addressed, and would not be responsible if they declined to deliver telegrams sent to Messrs. *Street* unless told what the name of the firm and what the address was. The *Union Bank of Spain and England* have, with the consent of the Post Office, registered "*Street, London,*" not as the name of a firm, but, if I may so say, as a fancy title; not intending to represent themselves as *Street & Co.* If Messrs. *Street & Co.* desire to have telegrams properly delivered, I think they ought to use their proper name and address. I think any one is entitled to adopt as a fancy address for the purpose of telegraphing that which is

not any one else's proper name and address. If there were two *Smiths* living in *Grosvenor Square*, and telegrams were to be addressed simply *Smith, Grosvenor Square*, I think neither of them could complain if the telegrams intended for one got into the hands of the other. And I think I should be doing what both the late Master of the Rolls and the Lords Justices in the case of *Day* v. *Brownrigg* (1) thought would be going beyond the jurisdiction of the Court if I were to grant an injunction where there was no attempt to interfere with trade; no legal injury done; but where there simply was a matter of inconvenience. All I can do at the present moment is to refuse the injunction.

Solicitors: *Jackson & Co.; Freshfields & Williams.*

D. P.

In re ANDREWS.
EDWARDS *v.* DEWAR.

[1884 A. 1680.]

Married Woman—Separate Estate—Restraint on Anticipation—Costs—Proceedings improperly instituted.

A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted (without a next friend) against the trustees proceedings in the course of which she took out a summons which was refused:—

Held, that the restraint on anticipation did not prevent the Court from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income.

THIS was an originating summons for the administration of the real and personal estate of *James Andrews*, who died on the 6th of August, 1884. His will was dated the 1st of February, 1882. The Plaintiff was *Sarah Edwards*, a married woman, who was a daughter of the testator. The Defendants were the trustees and executors of the will. By his will the testator devised and bequeathed certain specified real and leasehold property to the trustees upon trust to pay the income to the Plaintiff, for her separate use without power of anticipation, and after her death to

(1) 10 Ch. D. 294.

PEARSON, J. 1885 *In re* ANDREWS. EDWARDS *v.* DEWAR.

sell the property, and to hold the proceeds of sale on certain trusts for her children. The testator also gave a share of the residue of his estate to the trustees, on similar trusts for the Plaintiff and her children.

On the 20th of January, 1885, Mr. Justice *Pearson*, at Chambers, gave judgment, declaring that the trusts of the testator's will, so far as the same related to the property thereby specifically devised and bequeathed on trust for the Plaintiff and her children, ought to be performed and carried into execution, and ordered the same accordingly, and directed certain inquiries and accounts to be made and taken.

On the 13th of February the Plaintiff took out a summons, asking that the originating summons might be reheard on further evidence. The Plaintiff desired to obtain a judgment for the general administration of the estate. The Defendants alleged that there would be no residue of the testator's estate.

Cozens-Hardy, Q.C., and *Micklem*, for the Plaintiff:—

The summons asks for a rehearing; that may not be right in form, but, in substance, what is asked is an addition of further accounts and inquiries to the judgment.

Cookson, Q.C., and *Method*, for the trustees:—

We raise no technical objection.

PEARSON, J., refused the application.

Cookson, Q.C.:—The summons should be dismissed with costs, and the trustees should have liberty to retain their costs out of the Plaintiff's income.

Cozens-Hardy, Q.C.:—The Plaintiff is restrained from anticipating her income.

PEARSON, J.:—

The restraint on anticipation is intended for the protection of a married woman outside the Court; it is not intended to enable her to do a wrong in the Court. It does not fetter the power of the Court in any case in which it thinks that she is not entitled

to that protection. It does not prevent the Court from directing her income to be applied in the payment of the costs of proceedings which she has improperly instituted. By making such an order the Court does not enable the married woman to anticipate her income, but deprives her of it till she has paid what the Court thinks she ought to pay. I will give the trustees liberty to retain their costs of this application out of the income to which the Plaintiff is entitled.

PEARSON, J. 1885 *In re* ANDREWS. EDWARDS *v.* DEWAR.

Solicitor for Plaintiff: *B. E. Greenfield.*
Solicitors for Defendants: *Remnant, Penley, & Grubbe.*

W. L. C.

In re PAGET'S SETTLED ESTATES.

PEARSON, J. 1885 *June* 25.

[1885 P. 840.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 51, 58, *sub-s.* 1, *cl. vi.*—*Person having Powers of Tenant for Life—Conditional Life Estate—Invalidity of Condition—Application of Proceeds of Sale of Estate.*

A testator devised his *B.* estate to the use of his son, "so long as he shall reside in my present dwelling-house, or upon some part of my *B.* estate, for not less than three months in each year after he shall become entitled to the actual possession thereof;" and, after the death of the son, provided that he should have complied with the condition, to such uses for the benefit of his children as he should by will appoint; and, in default of such appointment, or, if he should fail in compliance with the above condition, on the determination of his estate therein, to the use of trustees, on trust for sale and distribution of the proceeds of sale among the son's children:—

Held, that the son had the powers of a tenant for life under the *Settled Land Act*, and could sell the estate, and that, notwithstanding the condition as to residence, he would, by virtue of sect. 51 of the Act, be entitled to the income of the proceeds of sale during his life.

THIS was a summons under the *Settled Land Act*, 1882, by Mr. *F. H. Paget*, who claimed to be tenant for life of an estate in *Leicestershire*, called the *Birstall* estate, under the will of *Henry Paget*, deceased, asking for the opinion of the Judge (1) whether the applicant had, under the will, the powers of a tenant for life in relation to the real estate in question; (2) for the sanction of the Court to his selling the mansion-house situate on the estate;

PEARSON, J. 1885 *In re* PAGET'S SETTLED ESTATES.

(3) whether a condition contained in the devise to him by the will was void under sect. 51 of the *Settled Land Act*; (4) in what manner the purchase-money of any property sold by the applicant as tenant for life under the will, and the income thereof, ought to be dealt with.

Henry Paget, by his will, dated the 8th of August, 1856, devised the *Birstall* estate to the use of his son, *F. H. Paget*, "so long as he shall reside in my present dwelling-house, or upon some part of my *Birstall* estate, for a period of not less than three calendar months in each year, after he shall become entitled to the actual possession thereof, and from and immediately after the death of my said son, *F. H. Paget*, provided he shall have complied with and fulfilled the above condition," to such uses for the benefit of all or any one or more of the children of *F. H. Paget* as he should by will appoint, give, or devise the same. And, in default of such appointment, gift, or devise, "or, if my son *F. H. Paget* shall fail in compliance with the above condition, on the determination of his estate therein," to the use of trustees in fee, upon trust to sell the same, and to stand possessed of the proceeds of sale, after payment of expenses, in trust for the child or children of *F. H. Paget* as therein mentioned, and, in default of children, on trust for other persons.

Cozens-Hardy, Q.C., and *Northmore Lawrence*, for the summons:—

Under sub-sect. 1 cl., vi., of sect. 58 (1) of the *Settled Land Act*,

(1) Sect. 58, sub-sect. 1: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely) (*inter alia*) (vi.) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose."

Sect. 51, sub-sect. 1: "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any

1885

In re PAGET'S SETTLED ESTATES.

1882, the applicant has the powers given by the Act to a tenant for life of settled land, and, therefore, under sect. 3, the power of selling the settled land, subject to obtaining the leave of the Court as regards the mansion-house: sect. 15.

Then, sect. 51 renders the condition of residence void so far as it affects the power of sale, and the result is that the applicant will be entitled to the income of the proceeds of sale for his life, free from any condition. The "residence clause" certainly tends to induce the applicant to abstain from exercising the power of sale. The object of sect. 51 is to render void all attempts to fetter the power of alienation which the Act intended that a tenant for life of settled land should have. In *In re Brown's Will* (1) Vice-Chancellor *Bacon* gave a tenant for life leave to sell the mansion-house, notwithstanding that the settlor had by his will directed that the house should be kept up as a place of residence for the person for the time being entitled to the possession thereof under the will.

George Williamson, for the trustees:—

Sect. 51 does not make the condition void altogether, but only for the purposes of that section. Sect. 22 provides by sub-sect. 5 that capital money arising under the Act, and the securities on which it is invested, shall be held on the same trusts as the land from which it arises would, if not disposed of, have been held, and have gone under the settlement; and by sub-sect. 6 that the income of the securities shall be paid or applied as the income of the land, if not disposed of, would have been payable or applicable

---

personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void."

"(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same."

(1) 27 Ch. D. 179.

PEARSON, J. 1885 *In re* PAGET'S SETTLED ESTATES.

under the settlement. The "residence clause" will therefore apply to the income of the proceeds of sale so as to accelerate the remainders after the estate given to the applicant.

PEARSON, J.:—

I do not see how to get over the words of sect. 51. The estate in question is a small one, with a large mansion-house on it, and the present income derived from it is not sufficient to enable a gentleman to live in the house in the style in which a gentleman would expect to live in a house of that kind. The testator settled the property in a very curious way:—[His Lordship read the will.] One could understand a testator who was the owner of an old family estate being desirous that his son should live among his tenants, and continue to reside in the house in which his family had lived from generation to generation. But in such a case one would naturally expect that the testator would furnish his son with the possession of an income sufficient to enable him to discharge the duties which would devolve upon him as the owner of such an estate. In the present case the income of the estate is wholly insufficient for that purpose. And, though the testator has attempted to compel his son to reside on the property, it was not his intention to keep the property in the family in case the son should fail to comply with the condition, for in that event he directs his trustees to sell the property. It is impossible to conceive a greater absurdity than the provisions of this will. The son now applies under the *Settled Land Act* for leave to sell the mansion-house, and the first question is whether he has the powers of a tenant for life under the Act. His estate is "liable to cease by a conditional limitation," and it appears to me that it comes within the words of sub-sect. 1, cl. vi., of sect. 58, and that, consequently, the applicant has the powers of a tenant for life under the Act and can sell the settled estate. Then arises the question, what is the effect of that which has been called the "residence clause," and this depends upon sect. 51, which is expressed in the amplest and widest terms. It is impossible to say that this clause, which defeats the estate of the son, in case he fails to comply with the condition as to residence, does not tend to induce him to abstain from exercising the power of sale which

PEARSON, J.
1885
In re PAGET'S SETTLED ESTATES.

is conferred on him by the Act. The condition is therefore made void by sect. 51, and, if the son exercises the power of sale, his interest in the proceeds of sale will by virtue of sub-sect. 2 continue. I must make a declaration to this effect (following the words of sect. 51), and I give leave to sell the mansion-house. The trustees may pay the costs of this application out of any capital moneys in their hands.

Solicitor for applicant: *C. J. Mander*, agent for *Miles, Bouskell, & Place, Leicester.*

Solicitors for trustees: *Williamson, Hill, & Co.*

W. L. C.

PEARSON, J.
1885
June 25.

In re MACREIGHT. PAXTON *v.* MACREIGHT.

[1885 M. 1133.]

Domicil—Abandonment—Acquired Domicil—British Subject in Military Service of Crown.

The rule that a British subject does not, by entering into and remaining in the military service of the Crown, abandon the domicil which he had when he entered into the service, applies to an acquired domicil as well as to a domicil of origin.

An infant, whose father was then living in *Jersey*, where he had acquired a domicil in place of his English domicil of origin, obtained a commission in the British army in 1854 and joined his regiment in *England*. He served with the regiment in different parts of the world, and ultimately, in 1863, he died in *Canada*, where he then was with the regiment. He had in the meantime paid occasional visits to *Jersey* while on leave:—

Held, that he retained his *Jersey* domicil at the time of his death.

THIS was an originating summons, asking for a declaration that *Frederick A. Macreight*, who died intestate and unmarried on the 14th of May, 1863, was at the time of his death domiciled in *Jersey*.

The intestate was born on the 13th of January, 1836, in *London*, where his father and mother, who were British subjects and domiciled in *England*, were then residing. In the year 1840 his parents went to live in the island of *Jersey*, with the intention of permanently remaining there. The father bought a house

PEARSON, J. 1885 *In re* MACREIGHT. PAXTON *v.* MACREIGHT.

there in 1844, and he never afterwards had any other settled residence. He died in that house in December, 1856.

The intestate was about four years old when his parents went to *Jersey*; they took him with them, and he resided with them there continuously until the year 1854, when he obtained a commission in the British army and joined his regiment in *England*. He served with his regiment in *Ireland*, *Malta*, and the *Crimea* until the year 1856, when he went with it to *Canada*. He remained in *Canada*, serving there with his regiment, for some years. He was afterwards, for a short time, in *Ireland* at the depot of the regiment. He then returned to *Canada*, and remained on active service there with the regiment until his death in May, 1863. During the period of his service in the army he, on two or three occasions, went to *Jersey* on leave.

Upon his death his mother took out administration to his estate. She died on the 11th of April, 1884, and administration *de bonis non* of the intestate was, on the 2nd of April, 1885, granted to the Defendant. The Defendant was also the executor of the mother of the intestate. The intestate left surviving him two brothers and two sisters. The sisters were married.

According to the law of *Jersey* the personal estate of a bachelor who dies intestate and without a father is distributable among his brothers and sisters, in equal shares, to the exclusion of his mother.

The Plaintiff was the trustee of the marriage settlement of one of the intestate's sisters.

E. F. Buckley, for the Plaintiff:—

The domicil of the intestate at the time of his death was in *Jersey*. The rule is thus laid down in *Dicey* on the Law of Domicil (1): "A soldier or sailor in the service of his own sovereign retains the domicil which he had on entering the service, wherever he may be stationed."

This passage is quoted with approval by Lord Justice *Lindley* in *Ex parte Cunningham* (2). The principle of the rule thus laid down applies as much to an acquired domicil or domicil of choice as to a domicil of origin.

(1) Page 139. (2) 13 Q. B. D. 418, 425.

S. Dickinson, for the Defendant:—

The rule is expressed too widely by Mr. *Dicey*: *Hayes & Jarman's* Concise Forms of Wills (1). No doubt it applies to a domicil of origin, and most, if not all, of the cases in which the question has arisen related to domicil of origin. The only exception is *In the Goods of Patten* (2). A domicil of choice is much more easily abandoned than a domicil of origin: *Udny* v. *Udny* (3). When a British subject has acquired a domicil different from his domicil of origin, and he then enters the military service of the Crown, there is no longer any evidence of his intention to retain his domicil of choice; on the contrary, there is evidence of an intention to abandon it. An infant on obtaining a commission in the British army becomes *sui juris*. Either, therefore, when the intestate's father sent him to join the army he shewed an intention that his son should revert to his original domicil, or the intestate himself, by his own act in joining the army, shewed an intention of reverting to his domicil of origin. If the regiment had been quartered in *Jersey* when he entered it, and it had afterwards been ordered away to *England*, the result might have been different, because then the intestate would have gone away under compulsion. *Ex parte Cunningham* (4) related to a domicil of origin.

PEARSON, J.:—

It is admitted that the intestate's father went to *Jersey* with the intention of permanently residing there, that he carried out this intention, and that at the time of his death his domicil was in *Jersey*. The intestate, who was an infant when his father went to *Jersey*, acquired the domicil which his father acquired; he lost his English domicil of origin and acquired a *Jersey* domicil. When he joined the British army in 1854, his regiment was, as I gather from the evidence, quartered in *England*, and I will assume for the purpose of my judgment that it was. After he joined the regiment he went with it wherever it was ordered on service, as a soldier of course would do. Ultimately, in 1863, being still in the army, he died in *Canada*, where his regiment

(1) 9th Ed. p. 552, *et seq.*
(2) 6 Jur. (N.S.) 151.
(3) Law Rep. 1 H. L., Sc. 441.
(4) 13 Q. B. D. 418.

PEARSON, J. 1885 *In re* MACREIGHT. PAXTON *v.* MACREIGHT.

was then quartered. The question is, what was his domicil at the time of his death? It is said that, when he entered the army and left *Jersey*, it must be assumed that he did this with the intention of abandoning his *Jersey* domicil, because he was going into the army and intended to be absent from *Jersey*, and, inasmuch as an acquired domicil may be easily lost by a change of residence, it is said that he lost the domicil which he had acquired in *Jersey*, and re-acquired his English domicil of origin. To my mind this is not so. The intestate when he left *Jersey* was still an infant, and he could not in the eye of the law have any mind; he was not capable of forming an intention on the subject. As I understand the rule of law it is this: A British subject does not by merely entering into the British army abandon his domicil, and his remaining in the army is no evidence of an intention to abandon the domicil which he had at the time when he entered it, but, so long as he remains in the army, he retains that domicil which he had when he entered it. This, as it seems to me, determines the present case. The intestate, being an infant when he entered the army, could not elect to change his domicil. What evidence is there of any subsequent intention to change his domicil? So long as he remained in the army time did not count, and there is really no evidence of any intention to change his domicil, except the fact that he remained for nine years in the army. I, therefore, decide that, at the time of his death in *Canada*, he retained the same *Jersey* domicil which he had when he entered the army.

Solicitor: *W. H. Oliver.*

W. L. C.

PEARSON, J.

1885

June 25.

In re SHAKESPEAR. DEAKIN *v.* LAKIN.

[1885 S. 1072.]

Married Woman—Separate Estate—Contract—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4.

The contract entered into by a married woman "to bind her separate property," referred to in sect. 1, sub-sect. 4, of the *Married Women's Property Act*, 1882, is a contract entered into at a time when she has existing separate property.

If the married woman commits a breach of such a contract, and a judgment is recovered against her for the breach, the judgment can be enforced against any separate property which she then has.

But sect. 1, sub-sect. 4, does not enable a married woman who has no existing separate property to bind by a contract any separate property which she may possibly thereafter acquire.

By articles of settlement entered into before the marriage of Mr. and Mrs. *Shakespear* in 1843, the husband covenanted to surrender a copyhold to the uses thereinafter mentioned, and to assign to the trustees a policy of assurance for £1000 on his own life. The copyholds were to be limited to the use of the trustees during the joint lives of the husband and wife, upon trust out of the rents and profits, or by mortgage, to pay the premiums on the policy, and to pay the surplus rents to the wife and her assigns during the joint lives, for her sole and separate use free from the control of the husband, and, if the husband survived the wife, then, after her decease, to the use of the trustees, during the life of the husband, upon trust to pay the premiums on the policy and to pay the surplus rents to the husband, and, after his decease, to the use of the children of the marriage as tenants in common, their heirs and assigns, with a clause of accruer on death under twenty-one without issue. A power was given to the trustees, with such consent as therein mentioned, to sell, and to hold the proceeds of sale upon the same trusts as had been declared concerning the copyhold, without any direction to reinvest.

The trusts of the policy were to receive and invest the money, and to pay the income to the wife "and her assigns, during her

PEARSON, J. 1885 *In re* SHAKESPEAR. DEAKIN *v.* LAKIN.

natural life in case she shall survive the said *T. Shakespear*, and for her sole and separate use and benefit during her life in case she shall marry again," and after her death upon trust for the children of the marriage as tenants in common, with a clause of accruer on death under twenty-one without issue.

In March, 1850, the copyhold was enfranchised to the husband, and on the 10th of April, 1850, he conveyed it to the trustees, upon trust during the life of the husband to pay the premiums on the policy, and subject thereto to pay the rents to the wife for her life, for her separate use independently of her present or any future husband, and after her death to the husband for his life, and after the death of the survivor to hold the property upon the trusts of the articles. By the same deed the policy was assigned to the trustees upon the trusts of the articles.

In 1878 the enfranchised copyhold was sold, and was now represented by £923 consols.

There were only two children of the marriage who acquired vested interests. One died a spinster and intestate in 1869, and the other a bachelor and intestate in March, 1883. Mr. *Shakespear* took out letters of administration to both.

By a deed of the 7th of October, 1884, Mr. and Mrs. *Shakespear*, assigned all their interests in the trust property to Mr. *Deakin*, who applied to the surviving trustee to transfer the consols and assign the policy to him. The trustee being advised that he could not safely comply with this application, the purchaser took out an originating summons, asking for a direction to the trustee to make the transfer and assignment. Mrs. *Shakespear* was seventy years of age.

H. Warlters Horne, for the purchaser:—

By virtue of sect. 1, sub-sect. 4 of the *Married Women's Property Act*, 1882 (1), a married woman can now contract so as to bind future separate estate. The law as laid down in *Pike* v. *Fitzgibbon* (2), and *King* v. *Lucas* (3), has been altered by that sub-section.

(1) Sect. 1, sub-sect. 4: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

(2) 17 Ch. D. 454.

(3) 23 Ch. D. 712.

[PEARSON, J.:—If Mrs. *Shakespear* should survive her husband she will, until she marries again, have an absolute interest in the income of the policy money (not an interest to her separate use). The interest to her separate use will not arise unless she marries again, a contingency which may never happen. I think the words "to bind her separate property" in sect. 1, sub-sect. 4, point to separate property *in præsenti* at the time of the contract.]

[*Baynton* v. *Collins* (1) was also referred to.]

H. Cadman Jones, for the trustee, was not called upon.

PEARSON, J.:—

At the present moment the wife has not any separate estate in the policy; she has only a contingent reversionary interest in it to her separate use. If she should survive her husband, she will have no separate estate in the proceeds of the policy unless and until she marries again. It is said that by virtue of sect. 1, sub-sect. 4, of the *Married Women's Property Act*, 1882, she can now enter into a binding contract to part with that future contingent separate estate; that, though at the present moment she has no separate property in the fund, her contract will bind that future separate interest in case it should hereafter arise. In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract, and which she has at the time when judgment is recovered against her, will be liable for the breach of contract. But the Act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property. I must dismiss the summons.

Horne:—There will be no objection to the trustees transferring the consols; the wife has an existing separate estate in the income of them.

(1) 27 Ch. D. 604.

PEARSON, J. 1885 *In re* SHAKESPEAR. DEAKIN *v.* LAKIN.

Cadman Jones:—The first trust of the consols is to pay the premiums on the policy. They cannot therefore be transferred, if the policy cannot be assigned.

PEARSON, J.:—That is so.

Solicitors for Purchaser: *Royle & Co.*

Solicitors for Trustee: *Horne & Birkett.*

W. L. C.

PEARSON, J. 1885 *June* 29, 30.

VON BROCKDORFF *v.* MALCOLM.

[1885 V. 269.]

Power—Exercise—Special Power—Exercise by Will—Bequest of all Property over which Testator at the Time of his Death should have "any beneficial disposing power by will"—Remoteness—Intervention of Trustees.

A testator, who had under a settlement a power of appointment over leasehold and other personal estate among his children or grandchildren or other issue, by his will, which contained no reference to the power, gave "all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease, I shall have any beneficial disposing power by this my will" to trustees, upon trusts partly for persons who were objects of the power, and partly in excess of the power:—

Held, that the use of the word "beneficial" did not conclusively shew that the testator could not have intended to exercise a power which he could not exercise for his own benefit or the benefit of his estate.

Ames v. *Cadogan* (1) discussed.

There being, in the opinion of the Court, upon the will taken as a whole, a sufficient indication of an intention to exercise the power:—

Held, that the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative.

The testator gave a moiety of the property on trust for his daughters who should survive him, and attain twenty-four, in equal shares. The testator's youngest daughter was more than three years old at the time of his death:—

Held, that the appointment was not void for remoteness.

Held, also, that the appointed fund ought to be retained by the trustees of the settlement on the trusts of the will, so far as they were valid.

THIS was a special case stated for the opinion of the Court to determine whether Admiral *G. J. Malcolm* had by his will exercised a special power of appointment which was vested in him.

(1) 12 Ch. D. 868.

By a deed-poll dated the 18th of August, 1851, *Anna Shaw*, in exercise of a general power of appointment vested in her, appointed that certain leasehold premises and other personal estate should be held by the trustees of a deed of the 28th of March, 1845, after her decease, as to one moiety of one equal fourth part of the property, upon trust to pay the income to *G. J. Malcolm* during his life, and after his death in trust for all and every or such one or more exclusively of the other or others of the children or the grandchildren or other issue of *G. J. Malcolm*, such grandchildren or other issue to be born in his lifetime, as he should direct or appoint by deed or by his will, and, in default of such direction or appointment, in trust for all and every the children and child of *G. J. Malcolm* who being a son or sons should attain the age of twenty-one years, and who being a daughter or daughters should attain that age or marry under that age, equally to be divided between such children if more than one as tenants in common, their respective executors, administrators, and assigns, and, if there should be but one such child, then the whole for that one, and, if there should be no such child, then on certain other trusts. Provided always, that it should be lawful for *G. J. Malcolm*, either before or after marriage, by deed or by his will, to appoint any part not exceeding one half of the clear yearly income thereby provided for him during his life, unto or in favour of any wife or widow for the time being of him during her life, if she should so long continue his widow, either absolutely or subject to such conditions and restrictions and in such manner in all respects as he should think proper, and such appointment should take effect either immediately or after his decease, and in preference to and should have priority over the trusts thereinbefore declared in favour of his child or children, or in default of issue as aforesaid. *Anna Shaw* died on the 27th of June, 1856. In 1860, *G. J. Malcolm* married the *Baroness Von Dungern*. Prior to his marriage he executed a deed-poll, dated the 12th of June, 1860, by which, in exercise of the power given to him by the deed-poll of the 18th of August, 1851, he appointed that, in case the then intended marriage should be solemnized, one half of the income of the trust fund by that deed-poll provided for him during his life should from and after his death

PEARSON, J. 1885 VON BROCKDORFF v. MALCOLM.

be paid to the Baroness during her life, if she should so long continue his widow, for her own absolute use and benefit. Provided nevertheless that, in case the intended marriage should not take effect, or the Baroness should die in his lifetime, it should be lawful for him by any deed legally executed or by his will to revoke and make void the appointment thereinbefore contained, so and in such manner that the said one-half of the yearly income of the trust premises might stand and be subject to the same power of appointment as if the deed now being stated had not been executed. The *Baroness Von Dungern* died on the 14th of September, 1866. On the 5th of December, 1876, *G. J. Malcolm* married Madame *Von Brockdorff*, the Plaintiff in this action.

G. J. Malcolm, who was then residing in *Germany*, made his will dated the 29th of May, 1877, and thereby, after appointing executors and trustees, and directing all his debts and his funeral and testamentary expenses to be paid, he directed "that the part (if any) not repaid by me before my decease of the sum of £500 advanced to me in August, 1867, out of the trust property by the trustees for the trust property left to me under or by virtue of a certain deed-poll dated the 18th day of August, 1851, by my grandmother *Anna Shaw*, be refunded into the trust, and that the said trustees may be reimbursed out of my estate any expense which they have been or may be put to on account of that advance."

And after making divers specific bequests, the will proceeded as follows:—"I give, devise, and bequeath all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power by this my will, and which I do not otherwise dispose of by will or codicil, to my trustees, upon trust, at such time or times after my decease as they in their discretion and of their absolute authority may deem expedient, to sell and dispose of, collect, get in, and convert into money so much and such parts of the same residuary estate as shall not consist of money or of such securities for or investments of money yielding income as my trustees shall think fit to continue for any time, and to invest the

moneys arising therefrom and the moneys of which I shall be possessed at the time of my decease in or upon any of the parliamentary stocks or public funds of *Great Britain* or in the stocks of the *Bank of England* or *Ireland*, or of the public stocks, funds, or securities of any colonial government or state, or of the German Empire, or of any of the states for the time being forming part of the German Empire, or at interest upon government securities in *England*, *Wales*, or *Ireland*, or in or upon the shares of the *Equitable Reversionary Investment Society*, or upon mortgage, charge, or other security of any lands or houses in the Grand Duchy of *Baden*, and with full power to make any such investments as aforesaid upon such title or titles as my trustees shall in each instance think proper under the circumstances to be satisfied with, which securities, and also any such of which I shall be possessed at my decease, I empower my trustees from time to time to alter, vary, and transpose for or into any other investments of the aforesaid natures as occasion shall require or as they shall think fit, and to stand possessed of my residuary estate and its investments (hereinafter called my residuary estate) upon the trusts following (that is to say): As to one equal half part thereof (hereinafter called the first trust fund) upon trust for all and every my daughters and daughter (whether by my present or former wife) who shall survive me, and shall, either in my lifetime or after my decease, attain the age of twenty-four years, and, if more than one, in equal shares as tenants in common. And, if I shall have no daughter who shall survive me, and who shall attain the age of twenty-four years, upon trust for all and every my sons and son (by my present wife) who shall survive me, and shall, either in my lifetime or after my decease, attain the age of twenty-one years, and, if more than one, in equal shares as tenants in common. And, as to the other equal half part thereof (hereinafter called the second trust fund), upon trust to pay the annual produce thereof unto my said wife during her life or until she shall marry again. And, upon the decease or marriage again (which shall first happen) of my said wife, upon trust for all and every my children and child (whether male or female, and whether by my present or former wife) who shall survive me, and shall, either in my lifetime or after my decease, being sons or a

PEARSON, J. 1885 VON BROCKDORFF v. MALCOLM.

son attain the age of twenty-one years, or being daughters or a daughter attain the age of twenty-four years, and, if more than one, in equal shares as tenants in common. And I direct that my trustees shall, in case all or any of my daughters shall marry before attaining the age of twenty-four years, hold as well any accruing as the original share which each daughter so marrying would have been entitled to if she had attained the age of twenty-four years on the day of such marriage, so that, until she attains the age of twenty-four years or dies, the income thereof shall be applicable for her separate benefit at the discretion of my trustees. And, should such married daughter attain the age of twenty-four years, the same share or shares shall be then made over to her for her separate and absolute use, but, should she die before attaining the age of twenty-four years, her share or shares shall be in trust for her child or children who shall attain the age of twenty-one years, and, if more than one, equally, or, failing such children, shall go and be in trust for such of her brothers and sisters as being brothers shall attain the age of twenty-one years, or being sisters shall attain the age of twenty-four years, with provisions similar to those before contained in case of any of them marrying under the age of twenty-four years. And I direct that my said trustees shall pay and apply the annual produce of the presumptive share for the time being of each or any child or grandchild of mine in such proportions and manner as they shall think fit for or towards the maintenance or education of such child or grandchild, but not so as to prejudice my said wife during her life without her consent in writing. And, so far as no child or grandchild of mine shall become entitled to my residuary estate under the trusts aforesaid, I direct that the same shall go (subject to the aforesaid trusts and provisions) to my cousin *Marianne*, the second eldest daughter now surviving of my uncle *Alexander Nesbitt Shaw*, and the wife of *John Macintyre*, an officer in the Royal Artillery." And the testator, after giving his trustees power to apportion blended trust funds, and to determine all questions arising out of his said will, declared as follows: "I declare that this my will or the appointment of executors thereof shall not extend to any property in the German Empire which may belong to me at my decease, or over which I may have any power of disposition, it

being my intention to deal with such property according to the terms of my German will, which bears date the 28th day of May, 1877, and, in case this German will shall be referred to *England*, the executors and trustees of my English will shall give effect to the provisions of my German will by allowing the executors and trustees of my German will to act for my German property."

On the 27th of September, 1877, the testator made a codicil to his will, by which, in consequence of the death of his former wife, Baroness *Von Dungern*, and by virtue and in exercise of the power reserved to him by the deed-poll of the 12th of June, 1860, he revoked, determined, and made void the appointment made by him by that deed-poll, so and in such manner that the one-half of the clear yearly income of the trust premises appointed by that deed-poll might stand and be subject to the same power of appointment as if that deed-poll had not been executed. The testator died on the 17th of January, 1884. The total amount of his personal estate in *England* at his death was £780. His debts at the same date amounted to £1228. He was also entitled to real and personal estate in *Germany*. His second wife survived him. He had three daughters by his first marriage. One of them died an infant and unmarried in 1882. The other two survived him. By his second marriage he had two sons and two daughters, who all survived him. The youngest daughter was born on the 9th of November, 1880. The testator did not exercise the powers of appointment given to him by the deed-poll of the 18th of August, 1851, except in so far as his will operated as an exercise of them. Only one executor proved the will.

This action was brought by the testator's widow against the testator's children, his executor, and the trustees of the deed of the 28th of March, 1845.

The questions submitted for the opinion of the Court were :—

1. Whether the will of the testator operated as an exercise of the powers conferred on him by the deed-poll of the 18th of August, 1851, or of any of those powers, and if so, of which of them.

2. Whether, if the first question should be answered in the affirmative, the provisions and bequests of the will, so far as the same operated as an exercise of the powers of appointment, were

PEARSON, J. to any, and, if so, to what, extent invalid for remoteness or other cause.

1885

VON BROCKDORFF v. MALCOLM.

3. Whether, if the first question should be answered in the affirmative, the trustees of the deed of the 28th of March, 1845, ought to retain the appointed trust funds in their own names, or to transfer them to the testator's executor upon the trusts of the will.

W. W. Karslake, Q.C., and *Dibdin*, for the Plaintiff:—

The question whether a power has been exercised by will is one of intention. The words should be construed *reddendo singula singulis*: *Thornton* v. *Thornton* (1). The will clearly indicates an intention to exercise the power. The direction to pay the testator's debts is not enough to displace that indication of intention: *Cowx* v. *Foster* (2); *Ferrier* v. *Jay* (3); *In re Teape's Trusts* (4). There could be no doubt about the matter, but for the opinion expressed by Mr. Justice *Fry* in *Ames* v. *Cadogan* (5), that the expression a "beneficial power" means a power which a testator can exercise for his own benefit or the benefit of his estate, and cannot apply to a special power. But that was not the sole ground of the decision in *Ames* v. *Cadogan*. A power may well be described as "beneficial" which enables a testator to make a provision for his wife and children.

Cozens-Hardy, Q.C., and *Hamilton Benn*, for the children:—

No doubt, if an intention is clearly shewn to exercise a power, it will not be disregarded merely because the testator has directed the payment of his debts out of a fund which he could not dispose of in that way. That direction would be void. But, if the intention to exercise is not otherwise clear, a direction to pay the testator's debts is a circumstance to be taken into consideration. It points to an intention to deal only with the testator's own property. There is no sufficient indication here of an intention to exercise the power.

[PEARSON, J., referred to *Pidgely* v. *Pidgely* (6).]

(1) Law Rep. 20 Eq. 599.
(2) 1 J. & H. 30.
(3) Law Rep. 10 Eq. 550.
(4) Law Rep. 16 Eq. 442.
(5) 12 Ch. D. 868, 871.
(6) 1 Coll. 255.

In that case the word "beneficial" was not used. The Court is asked to strike that word out of the will. In *Webster's* dictionary the word "beneficial" is defined "receiving or entitled to have or receive advantage, use, or benefit, as, the *beneficial* owner of an estate."

The word is never used in legal language in the sense of conferring a benefit on some one else. Here the appointment extends to some persons who are not objects of the power. This goes to shew an intention not to exercise the power, though, if the intention to exercise is otherwise sufficiently shewn, the excessive appointment may be disregarded as surplusage. The first codicil, though inoperative, tells in favour of an intention not to exercise the power.

[PEARSON, J., referred to *Crozier* v. *Crozier* (1).]

F. L. Wright, for the trustees of the original settlement.

T. C. Wright, for the executor.

PEARSON, J.:—

I do not hesitate to say that this is a case which no Judge could decide without misgiving. If ever there was a case just upon the line, this case is one. But there is a maxim to which I hold, perhaps as strongly as any one, that, if possible, you should construe a will *ut res magis valeat quam pereat*. At the same time, in determining this case, I desire most distinctly to be understood as not going one line out of the will which I have before me.

The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard

(1) 3 D. & War. 353.

PEARSON, J. 1885 VON BROCKDORFF v. MALCOLM.

to the intention of a man of whose intention you know nothing except what you find in his will.

[His Lordship stated the facts and continued:—]

I begin the consideration of this will by observing that the testator undoubtedly meant to dispose of everything which he could dispose of. He meant to dispose of, so far as he could, and according to his own mode of disposition, everything, either in *England* or in *Germany*, which he could deal with. With regard to the German property it would be impossible to raise any cavil, because with regard to it the words used are, not "any beneficial power," but "any power." I start, therefore, with the proposition that the testator undoubtedly meant to exercise whatever power he had. It is said that the word "beneficial" limits the exercise, and no doubt Mr. *Cozens-Hardy* is quite right in saying that in *Ames* v. *Cadogan* (1) Mr. Justice *Fry* did put such a construction upon the word "beneficial." I do not wish to shrink from a case which seems to stand in my way, and to shew that the word "beneficial" means beneficial to the person exercising the power. With all respect to that very learned Judge I confess that I am not disposed to think that you can limit the word "beneficial" in every case in that way. I am far from thinking or suggesting that he was not perfectly right in so limiting the word in that case, and, if his observations had been limited to the construction of the word "beneficial" in that particular will, I do not know that any doubt could have been raised as to his *dictum*, and the only doubt which I venture to hazard as to the correctness of the opinion of so learned a Judge is this, that the word "beneficial" need not always necessarily have that meaning. To my mind the use of the word "beneficial" in our language is exceedingly inaccurate, and I think it is as frequently used in the active as in the reflective sense. We are just as much accustomed to talk of a man exercising his power, or using his wealth, in a "beneficial" way, meaning in a way to benefit others, as of his doing so in a way to benefit himself. When, therefore, I have to construe the words "over which at the time of my decease I shall have any beneficial disposing power by this my will," I can only say that I do not think I am obliged to confine the word "beneficial"

(1) 12 Ch. D. 868.

to powers by which the testator could benefit himself or his estate.

Moreover, I think the word is less likely to be used in a will, which a man knows will not take effect until after his death, in that sense rather than in the sense of his being able to benefit others by what he is doing. I think, therefore, that, as I find elsewhere in the will strong indications of an intention to exercise the power, I am not precluded from saying that the testator intended to exercise it because he has used this word "beneficial."

[His Lordship then reviewed the various clauses of the will and the codicil, and concluded:—]

In spite of all the blunders in the will, and in spite of Mr. *Cozens-Hardy's* very able argument that there are very strong indications that there was no intention to exercise the power, I come to the conclusion that there are sufficient indications to satisfy the Court judicially that the testator did intend to exercise the power, and I decide accordingly that it has been exercised by the will. That leaves entirely open the question what is the effect of the exercise of the power.

Cozens-Hardy, Q.C., and *Hamilton Benn*, for the children:—

All the limitations to children are void, as in the case of daughters they might possibly be too remote. A daughter might not attain twenty-four till more than twenty-one years after the death of the testator. The gift is to a class, and, if part of it is void, the whole is void: *Pearks* v. *Moseley* (1).

F. L. Wright, for the trustees:—

The youngest child was three years old at the time of the testator's death. The class of children must, therefore, be ascertained within twenty-one years from his death: *Wilkinson* v. *Duncan* (2). The gift is therefore good, and the point which was decided in *Pearks* v. *Moseley* does not arise. It is immaterial whether the gift is to a class or individuals. The state of things at the time of the testator's death must be looked at. The daughters take absolutely; the direction to settle their shares is of course void.

(1) 5 App. Cas. 714. (2) 30 Beav. 111.

PEARSON, J. PEARSON, J.:—

1885

VON BROCKDORFF v. MALCOLM.

I think that *Wilkinson* v. *Duncan* (1) applies, and that the appointment is not void for remoteness. The daughters will take their shares absolutely.

W. W. Karslake, Q.C., for the Plaintiff:—

The third question is whether the trustees of the settlement ought to retain the appointed funds, or to transfer them to the testator's executor.

T. C. Wright, for the executor:—

The fund ought to be transferred to the executor: *Cowx* v. *Foster* (2); *Ferrier* v. *Jay* (3).

[PEARSON, J.:—The question is whether any trust remains to be performed by the trustees.]

F. L. Wright, for the trustees:—

The executor has no absolute right to call for a transfer: *Busk* v. *Aldam* (4). The Court will not authorize the transfer of trust funds to a single executor.

PEARSON, J.:—

I think that the trustees of the settlement ought to retain the fund.

Solicitors: *Bridges, Sawtell, & Co,; Bothamley & Freeman.*

(1) 30 Beav. 111.
(2) 1 J. & H. 30.
(3) Law Rep. 10 Eq. 550.
(4) Ibid. 19 Eq. 16.

W. L. C.

PEARSON, J.

1885

June 24;
July 14.

In re SPENCER.
THOMAS *v.* SPENCER.

[1885 S. 1184.]

Married Woman—Restraint on Alienation and Anticipation—Accumulations.

A testator directed surplus income of real and personal estate, after providing an annuity, to be accumulated during the life of his wife, after her death he gave the capital to his children: he directed that the shares of his daughters should be for their separate use, without power of alienation or anticipation during the wife's life:—

Held, that his married daughters during the life of their mother were entitled to receive only the income of invested income.

THIS was an originating summons, raising a question under the will of *William Spencer* deceased. The testator, by his will, declared that every bequest, trust, or other benefit in that his will contained in favour of any female should be for her own separate use, independently of any husband present or future, and without power of anticipation or alienation during the life of his wife *Jane Spencer*. He bequeathed to each of his six children, his two sons, *George Fox Spencer*, *William Spencer*, and his four daughters, *Elizabeth Houman Thomas*, *Jane Fox Manger*, *Kate Fox Grimson*, and *Louisa Fox Spencer*, legacies of £750. He devised and bequeathed his residuary real and personal estate to trustees upon trust to collect, call in, and convert into money all his said trust estate, except his freehold property, and thereout to pay his funeral and testamentary expenses, just debts, and the legacies thereinbefore bequeathed, and to invest the moneys thereby produced in the names or name of the trustees or trustee for the time being of that his will in the public or parliamentary stocks or funds or Government securities of the *United Kingdom*, and not in any other mode of investment, and out of the income thereof, and the rents, issues, and profits of his freehold property to pay to his wife, *Jane Spencer*, during her life, an annuity of £150, to commence from his decease. And upon further trust during the life of his said wife, to invest the surplus income, rents, issues, and profits arising from his said trust estate and from the investments

PEARSON, J. 1885 *In re* SPENCER. THOMAS *v.* SPENCER.

thereof, and accumulate the same upon some or one of the investments above mentioned; and from and after the decease of his said wife to sell all his said freehold property and to stand possessed of the moneys thereby produced and also the moneys produced by the collection, calling in, sale, and conversion of his said other trust estate, and the investments representing the same, and the accumulations thereof, in trust for his said six children, *George Fox Spencer*, *William Spencer*, *Elizabeth Houman Thomas*, *Jane Fox Manger*, *Kate Fox Grimson*, and *Louisa Fox Spencer*, in equal shares. The testator's widow and six children were all alive.

An object of the summons, which was brought by the testator's three married daughters, was the determination of the question whether the applicants were not entitled, with the consent of his widow, *Jane Spencer*, to the present receipt and enjoyment of their several shares in the property devised and bequeathed by the said will, notwithstanding the direction for accumulation, and also notwithstanding that the shares were given without power of anticipation or alienation during the life of the testator's widow.

Ingle Joyce, for the applicants:—

The attempted restraint against anticipation and alienation is inapplicable to an out and out gift of capital. The only possible doubt that can arise is from the judgments of Lords Justices *Baggallay* and *Cotton* in the case of *In re Bown* (1). In that case after a previous life interest a testatrix had given a married woman absolutely a share in a sum of money with a clause restraining alienation, it was held that on the determination of the life interest the married woman was entitled to receive the capital, but the Lords Justices *Baggallay* and *Cotton* considered that the lady could not have dealt with the fund while it was in reversion. This case differs, inasmuch as but for this repugnant clause the donees would be immediately entitled to receive the capital after providing for the annuity. Anticipation and alienation are both words inapplicable to such a right, and a clause attempting to restrain either one or the other is inoperative.

(1) 27 Ch. D. 411.

The effect of a restraint on alienation was considered by the late Master of the Rolls in *In re Ridley* (1).

Biss, for the trustees.

PEARSON, J.:—

The testator has chosen to make a fantastic will; the question is, to what extent is that will binding, whatever his intentions were. Of course, neither the sons nor the unmarried daughters are restrained from anticipation, and it is plain also that there being no gift over on alienation they are not bound by the restraints on alienation. With respect to the married daughters also I am inclined to think they are entitled to receive the income as it falls due. Under the ordinary construction of a clause restraining anticipation a person receiving income as it accrues is not said to anticipate, nor do I think that simply in receiving what they are entitled to receive *de anno in annum*, that they can be said to alienate. But there is another thing to which the clause against alienation may apply. I do not think the clause against alienation applies to anything but capital; that leaves them at liberty to receive the income as it accrues, but not to anticipate it. That is my present impression, but I will more carefully consider the case of *In re Bown* (2).

July 14. PEARSON, J.:—

I regret to say that I find the case of *In re Bown* too strong for me, having regard to the judgments of Lords Justices *Baggallay* and *Cotton*. I think I am bound to hold that the married daughters are not entitled to receive any part of the capital either of the original shares or of the accumulations during the life of their mother. They can only receive the income of the securities in which the accumulations are invested.

Solicitors for all parties: *Tompson, Pickering, Styan & Neilson.*

(1) 11 Ch. D. 645. (2) 27 Ch. D. 411.

D. P.

PEARSON, J.
1885
July 8.

In re COULMAN.
MUNBY *v.* ROSS.

[1885 C. 1927.]

Power of Appointment—Contingent Exercise of.

An appointment to an object of a power for life with remainder to his next of kin will take effect if at the death of the tenant for life his next of kin are objects of the power.

THOMAS COULMAN, of *Whitgift, Yorkshire*, died in the year 1852, having made a will by which he bequeathed personal estate to trustees upon such trusts as his wife *Mary* should by deed or will appoint; and he devised his real estate to the same trustees on trust to sell the same and invest the proceeds in manner directed, and to pay the interest and proceeds to his wife for life, and after her decease to stand possessed of the principal trust moneys arising from his real estate, "in trust to pay the same unto such of my two children for such interest or interests, with such limitations over for or in favour of them or other issue as my said wife *Mary* shall by any deed or deeds in writing, with or without power of revocation, or by her last will and testament in writing, or any codicil or codicils thereto, to be respectively duly executed, direct, limit, or appoint, and in default of such direction, limitation, or appointment, and subject thereto "if incomplete," as to one moiety (subject to life interests in their parents) in trust for the children of his daughter *Anne*, and as to the other moiety (subject to life interests in their parents) on trust for the children of *Mary Armitage*.

The testator, *Thomas Coulman*, left his wife, *Mary Coulman*, and two daughters, Lady *Anne Ross* and *Mary Armitage*, surviving him. *Eleanor Lister*, his only other child, died before the date of his will.

Mary Coulman never exercised her power of appointment by deed. She died in 1868, having made a will by which, after reciting the power of appointment given to her by the will of her husband, and that Lady *Anne Ross* and Sir *James Clark Ross*

were both dead, she appointed that one half the capital moneys arising from the personal estate of her late husband, and also one half of the capital moneys to arise from the sale of the real estate of her late husband, should after her decease be held by the trustees of her will upon trust to invest the same in manner therein directed, and to receive the income and proceeds thereof, and pay the same unto and equally between all the children living at her own decease of the said Dame *Anne Ross*, as tenants in common for the term respectively of their natural life; and after the decease respectively of such children she directed and appointed that the capital moneys out of which each such share of proceeds should arise should upon the death of the child entitled to the said proceeds be paid to such person or persons as such child should by will direct or appoint, and in default of such direction or appointment, and subject to any partial direction or appointment, the same should be paid to "his or her next of kin, exclusive of the husband of any married female child."

Anne Ross had four children, the three eldest of whom only were born in the lifetime of *Thomas Coulman*. They were all alive, and had attained the age of twenty-one.

Mary Armitage was dead: she had two children only, Mrs. *Brown* and Miss *Armitage*. Mrs. *Brown's* interest under *Thomas Coulman's* will was settled.

This was an originating summons to determine the rights and interests of all parties in a sum of £20,408 8*s.* 11*d.*, the proceeds of a share of real estate which had descended to *Thomas Coulman* as heir to his daughter *Eleanor Lister*.

Cookson, Q.C., and *Lambert*, for the Plaintiffs, the trustees of the wills of *Thomas* and *Mary Coulman*.

Everitt, Q.C., and *Renshaw*, for members of the *Ross* family:—

The gift to the next of kin of the youngest child of Lady *Ross* no doubt fails, as offending the rule against perpetuities. There is no reason that the rest of the appointment should not be good so far as it relates to the children of Lady *Ross* and the next of kin of the three eldest of them, if the next of kin of the children of Lady *Ross* happen, as will be the case in all probability, to be issue of such children.

PEARSON, J. 1885 *In re* COULMAN. MUNBY *v.* ROSS.

Cozens-Hardy, Q.C., and *Lewin*, for the trustees of Mrs. *Brown's* settlement, and *Paley*, for Miss *Armitage*:—

The appointment to "next of kin" is bad, because it is not certain that the next of kin will be objects of the power, and the appointment must be certain.

Everitt, in reply.

PEARSON, J.:—

The question is a very curious one. It is said with great truth that next of kin take as *personæ designatæ*. In the first place it does not follow that there will be any issue of the children of *Thomas Coulman* to be next of kin, and if there are no such issue the next of kin will not be objects of the power; secondly, even if there are such issue, it is said they would not take as issue, but as next of kin. To my mind there is no reason why they should not take if at the time when the tenant for life dies his next of kin happen to be issue. I do not see why I am bound to determine, at a period before the appointment to next of kin takes effect, whether it is bad or good. Just in the same way as a power which goes in words too far may be properly exercised within proper limits, so this power may be properly exercised by appointing to next of kin, if next of kin happen to be within the power. With respect to the appointment to the next of kin of the youngest child of Lady *Ross*, it is admitted that it offends the rule against perpetuities, and accordingly it must fail.

Solicitors: *Flower & Nussey*, agents for *Munby & Scott, York; Somerville*, agent for *Baxter & Co., Doncaster; Gregory, Rowcliffes & Co.*

D. P.

DYKE *v.* STEPHENS.

PEARSON, J.

1885

July 17.

[1885. D. 951.]

Infant—Next Friend—Affidavit as to Documents—Rules of the Supreme Court, 1883, Order xxxi., r. 12.

The Court refused either to order the next friend of an infant Plaintiff to make an affidavit as to documents, or stay the action till he made such affidavit.

Higginson v. *Hall* (1) dissented from.

THIS was an action brought by *John Ewart Dyke*, an infant, by his next friend, *Nicholas Kenrick Marsh*. The Plaintiff, under the will of his father, *John Dyke*, was entitled on attaining twenty-one, to his father's interest in a silk-mercer's business at *Liverpool*. His mother, *Louisa Dyke*, was entitled to the profits of the business in the meanwhile. *John Dyke* in his lifetime had agreed to take the Defendants, *Thomas E. Stephens* and *George W. Allman*, into partnership on certain terms. After the death of *John Dyke* an action was instituted in which *Louisa Dyke* was plaintiff and the infant children of *John Dyke* defendants, in which articles of partnership were sanctioned in pursuance of the agreement between *John Dyke*, *Thomas E. Stephens*, and *George W. Allman*.

The action was brought to set aside the agreement for a partnership, and the articles, as against *Thomas E. Stephens*, on the ground that he was the solicitor of *John Dyke* and obtained the agreement by undue influence; and that the facts were not properly disclosed to the Court in the action of *Dyke* v. *Dyke*. The Defendants to the action were *Thomas E. Stephens*, *Louisa Dyke*, and *George W. Allman*.

A summons was taken out on behalf of the Defendant *Stephens*, that *Nicholas Kenrick Marsh*, the next friend of the Plaintiff, might be ordered to make an affidavit as to documents. In Chambers, His Lordship dismissed the summons. This was a motion to discharge the order made in Chambers.

(1) 10 Ch. D. 235.

PEARSON, J. 1885 DYKE v. STEPHENS.

T. L. Wilkinson, for the Defendant *Stephens*:—

In the case of a next friend of a lunatic, an order was made like that asked for by the summons: *Higginson* v. *Hall* (1); however, in the case of *Crow* v. *Bank of Ireland* (2), Lord *O'Hagan* thought the right course was by analogy to the course pursued in proceedings by foreign Governments, *Republic of Liberia* v. *Imperial Bank* (3), or corporations, *Ranger* v. *Great Western Railway Company* (4), to stay the action or defence till an answer was put in by the next friend. I therefore ask for the order in that form.

Cozens-Hardy, Q.C., and *Ralph Neville*, for the Plaintiff, were not called upon.

[They referred to *Dimoline* v. *Ward* (5), where *Little*, V. C., refused to follow *Higginson* v. *Hall*.]

PEARSON, J.:—

I refused to make this order in Chambers and I refuse to make it now. It seems to me that it has been asked for under a misapprehension as to the *status* of a next friend. The rule under which the application is made is rule 12 of Order XXXI., that provided that any party may "apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath" of documents. The next friend is not a party to the action, he is put there simply to protect the interest of the infant, and to shew that the interest is of such nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action, and I have no jurisdiction to make an order on him as if he were a party. Mr. *Wilkinson* asks that an order may be made staying the action, unless the Plaintiff's next friend makes an affidavit as to documents. That is admitting that the order asked for by the summons is not a proper form of order. To do so would be to make the rights and interests of the infant depend on the conduct of the next friend; that is what the Court never does.

(1) 10 Ch. D. 235.
(2) 19 W. R. 910.
(3) Law Rep. 16 Eq. 179.
(4) 4 De G. & J. 74.
(5) Annual Practice, 1884–5, p. 381.

It is said there are authorities on the subject, and there are two cases which to a considerable extent bear out what Mr. *Wilkinson* says. The first is *Higginson* v. *Hall* (1), in which Vice-Chancellor *Malins* made an order that the next friend of a lunatic should make an affidavit as to documents; all I have to remark on that case is, that counsel for the lunatic consented and almost invited the order, and I cannot help thinking that if the case had been properly argued the Vice-Chancellor would have seen that the order ought not to have been made. The next case was one before Lord *O'Hagan*, *Crow* v. *Bank of Ireland* (2). I have, as no one can help having, the highest respect for the judgment of Lord *O'Hagan*. I do not know under what circumstances the order in that case was asked for; all I can say is, that if the judgment is correctly reported, I cannot agree with him in thinking that the case of a company is the same as that of an infant. A company is perfectly responsible in every sense. And the reason of making an order that an officer shall make an affidavit, is for the benefit of the company from whom discovery is required. The ordinary course would be that the corporation should make an affidavit, but a corporation cannot make an affidavit. If a corporation did not comply with the order, the proper consequence would be that the goods of the corporation should be sequestered. The corporation then says to the Court, Will you accept the affidavit of an officer? and the officer is put in the place of the corporation, and in that way makes an affidavit for the corporation.

That is not the case against an infant; certainly I cannot make an order against the next friend, who does not represent the infant, and is not within the terms of the rule. I must simply refuse this application with costs, as I did in Chambers.

Solicitors: *Lidiard & Co.; Field, Roscoe & Co.*, agents for *Lowndes, Son, & Lloyd, Liverpool.*

(1) 10 Ch. D. 235. (2) 19 W. R. 910.

D. P.

C. A.
1885
Jan. 15, 17, 24.

WEBB *v.* SMITH.

[1882 W. 4040.]

Assignment of Debt—Auctioneer—Lien—Marshalling—Two Funds, one subject to Lien, the other not.

The Defendants were auctioneers and had sold for a customer a brewery, and part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connection with the sale: they had also in their hands the balance of the price of some furniture sold by them for the same customer. The Plaintiff was a creditor of the Defendants' customer, and he by letter charged the proceeds of the sale of the brewery in favour of the Plaintiff. The Defendants wrote to the Plaintiff acknowledging the receipt of the letter of charge. The Defendants afterwards paid their customer the balance of the price of the furniture, and appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges:—

Held, first, that the letter of charge and the Defendants' acknowledgment thereof amounted to a good equitable assignment in favour of the Plaintiff:—

Secondly, that the Defendants, as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands:—

Thirdly, that the Defendants were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, and were not bound to take payment of their charges out of the price of the furniture in order to enable the Plaintiff to obtain payment of his charge, and that the doctrine of marshalling did not apply.

ACTION by an equitable assignee of a debt to recover the sum of £503.

The cause was tried before Vice-Chancellor *Bacon*, when the following facts were proved:—

The Plaintiff was a maltster and had supplied malt to *T. H. Canning*, a brewer, carrying on business at *Portsea* in *Hampshire*: in the beginning of July, 1882, *Canning* owed to the Plaintiff £503 for malt supplied. The Defendants were auctioneers, and had acted for *Canning* in the sale of a brewery and other property at *Cosham*, *Portsea*, and *Portsmouth*: they had put up the property for sale by auction in September, 1881, and in May, 1882, but it was not then sold. Ultimately, on the 5th of June, 1882, they

sold it by private contract to *G. H. Dean* for the sum of £10,125, and received £800 on deposit and in part payment of the purchase-money. At the time of the sale the brewery was undergoing repair, and one of the beerhouses named the *Duke of Edinburgh* was being rebuilt. A statement in writing was (by agreement with the purchaser) added to the particulars under which the purchase was made, as follows: "The present contract with Mr. *Croad* for two new shafts and shed at the brewery shall be completed at the vendor's expense;" and the particulars also contained a statement as to the beerhouse above-mentioned as follows: "This house was recently destroyed by fire, but is now being rebuilt at a considerable outlay, and shall be completed according to contract in due course by the contractor, Mr. *Croad*, of *Portsea*." At the time when the contract to purchase was signed, namely, on the 5th of June, 1882, it was verbally stipulated that the works to be executed by *Croad* should be carried out, and should be paid for by the Defendants as agents for *Canning*; and the Defendants verbally guaranteed that this should be done. On the 15th of June *Canning* gave an authority to the purchaser's solicitors to pay to the Defendants the balance of the purchase-money, and on the 24th of June the purchaser paid to the Defendants, as agents for *Canning*, a further sum of £2000 on account of the purchase-money in consideration of his being let into possession of the purchased property. On the same day the Defendants paid to the *Capital and Counties Bank* a sum of £1388 3*s*. 9*d*. on account of *Canning*; the Defendants had previously given to the bank an undertaking to indemnify it to the extent of £1700. On the 11th of July *Canning* gave to the Defendants an order to pay one *Terry* a sum of £211 for malt supplied to *Canning*, and on the 20th of July, 1882, the Defendants verbally undertook to pay *Terry*, and did, in fact, pay him on the 19th of August. The Defendants had had to pay large sums of money for *Canning*, who was in difficulties, and he was also indebted to them in the sum of £177 17*s*., being the amount of their professional charges and expenses against *Canning* in various matters in connection with the brewery and other property, including the advertising and putting up for sale by auction in September, 1881, and May, 1882. After deducting

C. A. 1885 WEBB v. SMITH.

the sum of £177 17*s.*, the only money remaining in the Defendants' hands on the 22nd of July, 1882, was £157 19*s.* 6*d.*, the Defendants being out of this amount liable to pay *Croad* any balance due to him. On the 22nd of July, 1882, *Canning* wrote and sent to the Defendants a letter signed by him, which (the formal parts being omitted) was as follows: "Please pay Mr. *C. Webb*" (the Plaintiff) "£503 due to him for malt on Mr. *Dean* settling the completion of purchase and charge to my account." On the 24th of July the Defendants wrote and sent to the Plaintiff a letter, which (the formal parts being omitted) was as follows: "We are in receipt of Mr. *Canning's* letter requesting us to pay you the sum of £503, and we hope the settlement will shortly be made, when we shall have much pleasure in complying with his instructions, if we have sufficient in hand to enable us to do so. You will understand that we only hold the deposit, and therefore are unable to say exactly what sum we shall have in hand at the settlement." The Plaintiff did not reply to this letter. On the 8th of August the Defendants out of the said sum of £157 19*s.* 6*d.* duly paid to *Croad* the sum of £75 18*s.* 7*d.*, being the balance due to him for work completed by him according to the particulars, and for which the Defendants by agreement with the purchaser were bound to pay out of the money in their hands. This left the sum of £82 0*s.* 11*d.*, and no more, in the Defendants' hands as the balance of moneys received by them from the purchaser in connection with the purchase. On the 18th of August, 1882, *Canning*, with his solicitor, attended at the office of the purchaser's solicitors and then completed the purchase, and received from them (without any consent or authority of the Defendants) the whole balance of the price payable by the purchaser. On the same day, after completing the purchase as aforesaid, *Canning*, with his solicitor, attended at the Defendants' offices, and after stating that he withdrew the authority given by him for payment to the Plaintiff, and that he himself would pay the Plaintiff's debt, claimed payment of the sum of £82 0*s.* 11*d.*, which accordingly was paid to *Canning* or his solicitor by the Defendants' clerk, who had the management of their business. A further sum of £207 11*s.* 6*d.*, which was then in the Defendants' hands, and was the balance of the purchase-moneys of certain

furniture sold by the defendants in lots by public auction, was at the same time paid by the Defendants to *Canning* or his solicitor. No part of such last-mentioned purchase-moneys was paid or payable by *G. H. Dean*, and the sale of the furniture was a matter wholly distinct from the sale to him.

The Defendants after action brought, namely, on the 20th of December, 1882, offered to pay to the Plaintiff the sum of £82 0*s.* 11*d.*, together with his costs of action up to that time, but he refused to receive the same.

At the trial of the action Vice-Chancellor *Bacon* ordered that an account should be taken of all moneys received by the Defendants or either of them as auctioneers or agents of *T. H. Canning* upon or in connection with the sale of the brewery and other property in *Portsea* of *T. H. Canning*, excluding the proceeds of the sale of the furniture of *T. H. Canning*; and in taking the account the payments made by the Defendants to *Croad* and *Terry* of the sums of £75 18*s.* 7*d.* and £211 respectively were to be allowed to the Defendants, but the sums retained by the Defendants for themselves were to be disallowed to the Defendants as against the Plaintiff. And the Vice-Chancellor further ordered that the Defendants should pay to the Plaintiff his costs up to and including the trial of the action.

The Defendants appealed against so much of the judgment of the Vice-Chancellor as directed that the sums retained by the Defendants for themselves were to be disallowed to the Defendants, as against the Plaintiff, and that the Defendants should pay to the Plaintiff his costs of the action up to and including trial thereof.

The Plaintiff appealed against so much of the judgment of the Vice-Chancellor as ordered that in taking the account thereby directed the payment made by the Defendants to Mr. *Croad* of the sum of £75 18*s.* 7*d.* was to be allowed to the Defendants.

The appeal and the cross-appeal came on for argument on the 15th and 17th of January, 1885.

Hemming, Q.C. (*Shebbeare*, with him), for the Defendants:—

First, the Defendants had a right to set off the amount due to them against the sum claimed by the Plaintiff: *Roxburghe* v.

C. A. 1885 WEBB v. SMITH.

Cox (1), which is exactly in point for the present case: the Defendants had a right of retainer which they were entitled to exercise, and this right of retainer was not taken away by their letter.

Secondly, if there was no right of retainer or set-off, the Defendants, as auctioneers, were entitled to a right of lien.

[BRETT, M.R.:—The judgment of the Court of Queen's Bench in *Robinson* v. *Rutter* (2) shews that an auctioneer is entitled to a lien of some kind.]

Thirdly, no equitable charge had been created in favour of the Plaintiff: the letter of *Canning* was merely an informal bill of exchange. A direction to pay when a fund arises, and a promise to pay when a fund is received, create no liability in equity: *Field* v. *Megaw* (3). Moreover, the letter of *Canning* was not a direction to pay out of a particular fund.

Marten, Q.C., and *Hadley*, for the Plaintiff:—

Robinson v. *Rutter* turned upon the special facts of the case. It was a question of mere pleading.

[*Hemming*, Q.C.:—The existence of a lien in favour of an auctioneer is recognised in *Coppin* v. *Walker* (4) and *Coppin* v. *Craig* (5).]

It is clear from *Sanderson* v. *Bell* (6) that no general lien exists in favour of auctioneers.

[BRETT, M.R.:—That case does not relate to a lien for business done as an auctioneer.

COTTON, L.J.:—That case related to work done in respect of a deed. In the present case the auctioneers have done work for the benefit of *Canning*: have they not a lien on the fund produced by their exertions?

LINDLEY, L.J.:—In *Sanderson* v. *Bell* the work in respect of which the lien was claimed, was not done in the course of an auctioneer's business.]

(1) 17 Ch. D. 520.
(2) 4 E. & B. 954.
(3) Law Rep. 4 C. P. 660.
(4) 7 Taunt. 237.
(5) Ibid. 243.
(6) 2 C. & M. 304.

Then the letter from *Canning* to the Defendants, and the Defendants' acknowledgment to the Plaintiff, amount to an equitable charge. The letter from *Canning* to the Defendants did amount to a direction to pay the £503 out of a particular fund, and it was so understood by the Defendants; therefore it amounted to an equitable assignment of the fund in the Defendants' hands. After these documents had been executed, no money could be paid over to *Canning* so as to discharge the Defendants, unless the Plaintiff's claim were first satisfied: *Brice* v. *Bannister* (1). The Defendants were not justified in paying off *Canning* without providing a fund to discharge the Plaintiff's claim: they ought not to have settled with *Canning* in derogation of the Plaintiff's right. The assets ought to have been marshalled: *Aldrich* v. *Cooper* (2). The Plaintiff relies upon *In re Westzinthus* (3), which is analogous to the present case: that was a case where the doctrine of marshalling was extended to bankruptcy. The argument for the Defendants is that they were entitled to do as they pleased; that they could take their debt of £177 17*s.* out of the money produced by the sale of the brewery and hand over the fund produced by the sale of the furniture to *Canning*: but this is an argument opposed to all the authorities, such, for instance, as *Pearl* v. *Deacon* (4). It is true that no case can be found where the doctrine of marshalling has been applied to two funds, there being a lien as to one only; but it is applied in numerous instances, such as the case of legatees and others.

Then, as to the cross-appeal, the Plaintiff objects to the allowance of the sum paid to *Croad*, because it was paid pursuant to a verbal guarantee, and therefore could not be enforced in law.

Hemming, in reply:—

The argument for the Plaintiff is that when one creditor has the right to be paid out of two funds, another creditor can compel him to pay himself out of a particular fund; but the doctrine of marshalling exists only in administration when the funds are in Court. When there are two funds in the hands of a creditor, and he has notice of a charge from another creditor upon one of the

(1) 3 Q. B. D. 569.
(2) 8 Ves. 382; 2 W. & T. L. C. 5th Ed. p. 80.
(3) 5 B. & Ad. 817.
(4) 1 De G. & J. 461.

C. A. 1885 WEBB v. SMITH.

funds, he may pay himself out of that fund if he has a lien upon it. All that is meant in *Aldrich* v. *Cooper* (1), or any of the other cases, is that the creditor with one fund shall not be prejudiced by the choice of the creditor with two funds to take payment out of the doubly charged fund, and that if the creditor with the two funds does so elect, as he may do, the other creditor shall stand in his shoes against the debtors. But the doctrine of marshalling never imposes any burden as against the creditor, and it is only when both funds are under administration that language has been used which at all encourages this idea. In no case has the doctrine of marshalling been applied to the prejudice of a creditor. The payment by the Defendants to *Canning* was voluntary: but that does not affect their position.

Jan. 24. BRETT, M.R.:—

This action was brought against auctioneers who, on behalf of a client, had sold certain real property, and also had sold certain furniture: the complaint is that, having sold this property and this furniture by auction, they received notice of a charge in favour of the Plaintiff, and in defiance of that notice they have paid themselves out of the property fund and not out of the furniture fund: they have done this notwithstanding a letter which they themselves have written. It has been said that the Defendants were bound by the charge in favour of the Plaintiff, and also by their own letter to him. As to the latter point, in order that they should be bound by their own letter, it must in truth be a contract; but I think that the letter of the Defendants was not a contract, and it was not so contended. The letter was not written with the intention of making a contract, and a person cannot contract without the intention to make a contract: moreover, if the letter did contain a promise to pay the Plaintiff, there was no consideration for the promise, and on this ground there was no contract. In the present case, the Plaintiff gave notice of his charge, and the Defendants' letter was intended merely to be an acknowledgment that the notice had been received. It is clear that the Defendants had the lien of auctioneers upon the

(1) 8 Ves. 382; 3 W. & T. L. C. 5th Ed. p. 80.

property fund arising from the skill and labour displayed by them in producing it; but they had no general lien. As regards the furniture fund, it does not seem that they had any lien; they might have a right of retainer if an action had been brought against them, that is, they might have had an answer by way of set-off in respect of any amounts retained by them. Here the two funds were in the hands of the same persons; over the one they had a right of lien, but not over the other. They stood in a different position with regard to the two funds. Can there be an application of the doctrine of marshalling as to these funds? I cannot think that the doctrine of marshalling applies where there are different funds as to which different rights exist. On this ground I think that the decision of the Vice-Chancellor must be reversed. But, further, as between the two parties the doctrine does not apply: it applies when the funds are in Court, and when the Court can exercise a jurisdiction over them.

COTTON, L.J.:—

In this case the Vice-Chancellor has disallowed the sums retained by the Defendants for their own benefit. Now the Plaintiff had undoubtedly an equitable charge, and it was said that the auctioneers could not deduct their charges from the fund produced by the sale of the brewery: but they had a lien in respect of their charges, and they were entitled to so much of the fund as represented their charges: therefore the Plaintiff as to this part of the fund was only a second incumbrancer, and his claim must be postponed to that of the Defendants. As to the residue of the fund produced by the sale of the brewery, the Defendants had no lien; but they had a right as against *Canning* of set-off. *Roxburghe* v. *Cox* (1) shews that an assignor can give no greater right in equity than he himself possesses. I think that I need not add anything to what the Master of the Rolls has said as to the Defendants' letter of acknowledgment: it was a mere acknowledgment of the notice of the charge; but after writing that letter they could not make a further charge, nor could they create an additional set-off. But the main point argued was as to the doctrine of marshalling. I

(1) 17 Ch. D. 520.

C. A. 1885 WEBB v. SMITH. Cotton, L.J.

must consider what that doctrine is, and how far it extends: it comes to this, that if *A.* has a charge upon *Whiteacre* and *Blackacre*, and if *B.* also has a charge upon *Blackacre* only, *A.* must take payment of his charge out of *Whiteacre*, and must leave *Blackacre*, so that *B.*, the other creditor, may follow it and obtain payment of his debt out of it: in other words, if two estates, *Whiteacre* and *Blackacre*, are mortgaged to one person, and subsequently one of them, *Blackacre*, is mortgaged to another person, unless *Blackacre* is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of *Whiteacre*, in order to leave to the second mortgagee *Blackacre*, upon which alone he can go. There was also another class of cases in which the doctrine was applied, namely, where under the old law, creditors by simple contract had no claim upon real assets, unless charged with or devised for the payment of debts, a Court of Equity would compel specialty creditors who might resort, in the first instance, to the personal estate, in priority of creditors by simple contract, and to the real assets, in exclusion of them, to recover satisfaction, in the first place, out of the real assets as far as they went. Again, where funds are in Court, the Court of Equity has applied the doctrine.

The difficulty has arisen from some words of Lord *Eldon* in *Aldrich* v. *Cooper* (1). But I think that he only means what he says there, namely, that if the mortgagee can obtain satisfaction out of the copyhold estate, he is compelled to take it out of it: his action was not to prejudice any other creditor. No case in point has been cited by counsel; and I think that the doctrine as to marshalling is not to be applied. It is said that no creditor is to be disappointed. It is true that apparently there were two funds: but the Defendants had no claim against or lien over the fund produced by the sale of the furniture: they could only have a set-off as to it, and the doctrine of marshalling applies only where there are claims or charges upon both funds. Therefore there could be no marshalling. The Defendants, as auctioneers, if they were sued, had a right to part of the fund produced by the sale of the brewery, because they had charges in respect of that fund; and there was nothing to compel them to adopt an inferior position,

(1) 8 Ves. 382, 396.

namely, to rely upon a set-off. The Plaintiff cannot compel the Defendants to hand over the fund produced by the sale of the brewery without allowing them to deduct their charges, but only the residue which remained after those charges had been satisfied. The appeal of the auctioneers must be allowed as to the balance of the fund produced by the sale of the brewery.

As to the cross-appeal, the question arises upon a contract of a simple nature: it was a contract with the purchaser for the execution of repairs: the sum paid to *Croad* stands upon the same footing as the proceeds of the sale of the furniture. It was a sum properly retained as against *Canning*, and if it was properly retained against *Canning*, it was properly retained against the Plaintiff.

LINDLEY, L.J.:—

This case is of considerable importance: it is an experiment tried for the first time. The action is brought against the auctioneers, who have sold a brewery for a customer. The Plaintiff relies upon an equitable assignment to him by *Canning*, and the first question is, what are the Plaintiff's rights under the equitable assignment? The Vice-Chancellor seems to have considered that the letter of the Defendants prevented them from exercising any rights which they might have. The terms of that letter have been fully commented upon, and it is plain that the Defendants did not intend to exclude themselves from any rights which they might have. It seems to me that this disposes of the point decided in the Plaintiff's favour. It has been contended that auctioneers have no lien: but they have a particular lien although not a general lien: it is so laid down in all the books and in *Robinson* v. *Rutter* (1); and as to the question of set-off this case is covered by *Roxburghe* v. *Cox* (2). So far as to the balance of the fund produced by the sale of the brewery, the law is clear.

But then the Plaintiff, *Webb*, relies upon another point, namely, as to marshalling; and as to this the action is an experiment. The Plaintiff, *Webb*, had a right of action and also a charge upon the fund in the Defendants' hands: but the Defendants had many rights: they had a right of lien and also they had a right of set-off. It is argued for the Plaintiff, *Webb*, that the Defendants

(1) 4 E. & B. 954. (2) 17 Ch. D. 520.

C. A. 1885 WEBB v. SMITH. Lindley, L.J.

were bound to obtain payment out of the fund produced by the sale of the furniture, so that he might obtain payment out of the fund produced by the sale of the brewery. Now, I will suppose that the Defendants had no fund upon which they could rely by way of set-off. There is a case which I will mention where the matter is treated of: it refers to the jurisdiction of the Court of Admiralty, and is called *The Arab* (1). In that case the holder of a bottomry bond tried to compel the crew of a ship to waive their right of maritime lien for wages for services rendered, and to sue the owners, who were perfectly solvent. The holder of the bottomry bond had only a remedy against the ship: whereas the crew had also a personal remedy by action of debt against the owners. The Judge of the Court of Admiralty held that he had no jurisdiction to restrain the proceedings of the crew against the ship, and to compel them to resort to a personal remedy against the shipowners: and the reason given is that there were not two funds under the control of the Court. In the present case I think that we are compelled to lay aside the suggestion that the Defendants are bound to give up their security and to sue *Canning* for the money due to them, or at least to retain the sum due to them out of the fund produced by the sale of the furniture. Such a suggestion is founded on a mistake. It is not warranted by *Aldrich* v. *Cooper* (2), or by any case decided before Lord *Hardwicke*. But a principle has been laid down, which has found its way into the text-books, and it is that assets shall not be marshalled where by so doing another man's right would be prejudiced: in this case if the doctrine of marshalling were applied, we should prejudice the right of the Defendants as to their lien. The general principle of marshalling was stated by Sir *William Grant*, M.R., in *Trimmer* v. *Bayne* (3), in the words that "a person having resort to two funds shall not by his choice disappoint another, having one only." That appears to be a correct statement of the law. The vice of the argument for the Plaintiff is that in truth there were not two funds to which the Defendants could resort, that is, two funds standing upon an equal footing. The Defendants had a superior right of lien as to the fund produced by the sale of the brewery. I think, however, that they could not have deprived the

(1) 5 Jur. (N.S.) 417. (2) 8 Ves. 382.
(3) 9 Ves. 209, 211.

C. A. 1885 WEBB v. SMITH. Lindley, L.J.

Plaintiff of the benefit of his charge, if there had been two funds to which they might have resorted under equal circumstances. The appeal of the Defendants must be allowed.

As to the cross appeal of the Plaintiff, it cannot be sustained, and it must be dismissed.

The Defendants are to be allowed the sums which were disallowed by the Vice-Chancellor as retained for themselves, and they are to be allowed the payment to *Croad*. The Plaintiff is to have the costs of the action up to the 20th of December, 1882, and the Defendants are to have the costs of the action since that time, including the costs of the appeal.

Solicitor for Plaintiff: *W. F. Stokes.*
Solicitors for Defendants; *Houghtons & Byfield.*

J. E. H.

C. A. 1885 *Jan.* 31; *Feb.* 2.

In re COUSINS.
ALEXANDER *v.* CROSS.

[1883 C. 6235.]

Will—Option to purchase—Interest not transmissible to Executors of Person to whom Option is given.

A testator devised and bequeathed certain real and personal property, including an hotel, to trustees upon trust to pay out of the rents, issues, and income thereof, annuities to his widow and sister, and during their lives and the life of the survivor to divide the residue of the rents, issues, and income equally between his four children; and after the decease of the survivor of his wife and sister he declared that his son should have the option of purchasing the hotel at the price of £10,000, such sum to fall into testator's residuary personal estate; but if the son should decline to purchase the hotel at that price within six months after the decease of the survivor of the testator's wife and sister, he directed that his trustees should sell the hotel, and that the moneys arising from the sale thereof should fall into his residuary personal estate. The son died very soon after his father, the testator, also leaving a will whereby he appointed executors. The testator's wife and sister being also dead:—

Held, that the option to purchase the hotel was a right personal to the son, and could not be exercised after his death by his executors.

ORIGINATING SUMMONS under Rules of the Supreme Court, 1883, Order LV.

C. A. 1885 *In re* Cousins. Alexander *v.* Cross.

The following questions were submitted to the Court: first, whether, according to the true construction of the will and codicil of *Henry Cousins*, the elder, the option of purchasing the *Mount Stuart Hotel*, and the shops and other buildings, and hereditaments purchased by *Henry Cousins*, the elder, and formerly the estate of *George Rawlinson*, deceased, can be exercised by the executors of *Henry Cousins*, the younger; secondly, whether the executors of *Henry Cousins*, the younger, ought now to exercise the option of purchase; and, thirdly, if so, in what way the money payable in respect of such purchase ought to be raised. The summons was taken out by *William Alexander* and *John William Alfred Stevens*, the surviving trustees of *Henry Cousins*, the elder, and also the executors of the will of *Henry Cousins*, the younger, against *Sarah Sophia Cross*, *Mary Ann Stevens*, *Sidney Edward Yates*, and *George Rider Ousey*, who represented the interests under the will of *Henry Cousins*, the elder, and *William James Cousins*, who was the sole beneficiary under the will of *Henry Cousins*, the younger.

Henry Cousins, the elder, by his will, dated the 5th day of March, 1874, wherein he described himself as "retired hotel-keeper," after directing the payment of his debts and funeral and testamentary expenses, and after bequeathing certain legacies to his wife, and directing that she should be permitted to occupy a house called *Haddington House* free from rent upon certain conditions, and after bequeathing to his sister, *Sarah Cousins*, a legacy of £30, gave, devised, and bequeathed "the *Mount Stuart Hotel* and the offices, shops, and other buildings and hereditaments, some time since purchased by me, and late the estate of *George Rawlinson*, deceased, my two villa residences, respectively known as *Haddington Villa* aforesaid and *Roxburgh Villa*, my two houses in *Oakfield Street, Routh*, aforesaid, and my shares in the *Cardiff Waterworks*, unto my friend *William Alexander*, of *Cardiff*, aforesaid, timber merchant, and my son, *Henry Cousins*, the younger, of *Cardiff*, aforesaid, hotel-keeper, their heirs, executors, administrators, and assigns, for all my estate and interest therein respectively, upon trust that they, the said *William Alexander* and *Henry Cousins*, the younger (hereinafter called 'the said trustees or trustee'), or the survivor of them, or the

executors or administrators of such survivor, their or his assigns, do and shall by, with, and out of the rents, issues, and income of the hereditaments and premises so devised and bequeathed as aforesaid, pay to my wife an annuity of £500 during her life, and to my said sister, *Sarah Cousins*, an annuity of £100 during her life for her separate use . . . and subject to the payment of the said annuities, I direct that during the joint lives of my said wife and sister and the life of the survivor of them the residue of the said rents, issues, and income (after satisfying the annuities aforesaid) shall go to, and be equally divided between, my said son *Henry* and my three daughters, *Sarah Sophia*, the wife of *Thomas Cross*, *Mary Ann*, the wife of *Alfred Stevens*, and *Emma Elizabeth Cousins*, as tenants in common; and after the decease of the survivor of them, my said wife and sister, I declare that my said son, *Henry Cousins*, shall have the option of purchasing the said *Mount Stuart Hotel*, and the offices, shops, and other buildings, and hereditaments, so purchased by me as aforesaid (subject and chargeable with the payment of an annuity of £200 to Mrs. *Mary Cooper*, widow, during her life now charged thereon, should she then be living) at the price of £10,000, such sum to fall into and be deemed part of my ultimate residuary personal estate; but if my said son shall refuse or decline to purchase the said last-mentioned premises at the price aforesaid within the period of six calendar months after the decease of the survivor of them, my said wife and sister, then I direct my said trustees or trustee to sell and dispose of the last-mentioned premises in manner hereinafter mentioned, and whether my said son shall refuse or decline as aforesaid or not, I direct my trustees or trustee at the expiration of the period aforesaid to sell and dispose of my said two villas known as *Haddington Villa* and *Roxburgh Villa*, my two houses in *Oakfield Street*, *Routh*, and my said waterworks shares by public auction or private contract. . . . And I direct that the moneys to arise or be produced from such sale or sales as aforesaid with the immediate rents and profits thereof shall fall into and be considered as part of my ultimate residuary personal estate; and as to all other my real property, if any, and all the rest, residue, and remainder of the personal estate whatsoever and wheresoever belonging to me at the time of my decease, I give, devise, and

C. A. 1885

In re COUSINS. ALEXANDER *v.* CROSS.

bequeath the same unto my said trustees or trustee, upon trust as soon as can be after my decease, to sell, get in, dispose of, and convert the same into money, and pay and divide the same unto and between my said four children in equal shares as tenants in common . . . and as to the moneys to arise or be produced by the sale of my said properties so charged with the said annuities as aforesaid, and all other my ultimate residuary personal estate, I bequeath the same (except as hereinafter mentioned) unto my said four children in equal shares as tenants in common. . . . I declare that my children respectively be deemed to take vested interests from the time of my decease." The testator appointed his wife, his sister, *Sarah Cousins*, and his son, *Henry Cousins*, executors of his will.

By a codicil, dated the 25th of November, 1874, to his will the testator appointed his sons-in-law, *Thomas Cross* and *John William Alfred Stevens*, to be trustees of his will together with his son, *Henry Cousins*, and *William Alexander*, in his will named, and then proceeded as follows:—"And whereas on or about the 2nd day of February, 1874, I gave up to my said son my business of an hotel-keeper as well as the lease or leases of the premises in which I carried on my said business, but no absolute assignment of the lease or leases under which I held the same has been executed, I direct my said trustees or trustee when required by him, his executors, administrators, or assigns, at the cost of my said son, his executors, administrators, or assigns, to execute such sufficient assignment as may be required. And I hereby will and declare that in the event of the death of my said son in my lifetime all and singular the beneficial interest which he would have taken under my will had he survived me, shall go to and be vested in the executors, administrators, or assigns of my said son, to whom in that event I give and bequeath the same accordingly, to be be held to and for the use of the executors, administrators, and assigns of my said son."

The testator died on the 10th of December, 1874, and his will and codicil were proved by his widow on the 22nd of March, 1875. He had possessed and carried on another hotel at *Cardiff*, called the *Angel*, but which he had made over to his son.

Henry Cousins, the younger, made his will on the 12th of

December, 1874, and died on the 29th of the same month. He gave no direction as to how money should be raised for buying the *Mount Stuart Hotel*. The widow and sister of *Henry Cousins*, the elder, died some time after his death. Owing to the increase of value in property at *Cardiff* the value of the *Mount Stuart Hotel* and the buildings connected with it had risen to be £30,000 instead of £10,000, the price fixed by the testator. If, therefore, the hotel were sold at its real value, the share of each of his three daughters in the proceeds would be £7500, whereas if it were sold at £10,000 the share of each daughter would be only £2500.

Vice-Chancellor *Bacon* decided that, according to the true construction of the will and codicil of *Henry Cousins*, the elder, the option of purchasing the *Mount Stuart Hotel* and the shops and other buildings and hereditaments purchased by *Henry Cousins*, the elder, and formerly the estate of *George Rawlinson*, deceased, could be exercised by the executors of the will of *Henry Cousins*, the younger, and that they ought now to exercise such option of purchase.

Sarah Sophia Cross and *Mary Ann Stevens*, two of the daughters of *Henry Cousins*, the elder, appealed to the Court of Appeal, and the appeal was heard on the 31st of January and the 2nd of February, 1885.

Hemming, Q.C., and *W. W. Karslake*, Q.C. (*Lambert*, with them), for *Sarah Sophia Cross* and *Mary Ann Stevens*:—

The question is whether the option of purchasing given by the father's will was a purely personal option, or whether it constituted a reversionary interest conditional on the payment of £10,000, which passed to the executors of the son. It is submitted that, upon looking to the terms of the will and the surrounding circumstances, the clear intention was to give a merely personal option to the son himself, and not to create in the son a reversionary interest in the hotel. It is clear that the son never contemplated the exercise of the option by his executors, for he directs them to invest his property in other securities. If the contention be correct, that an interest was created, it must be an interest that vested immediately, and the son could have gone

C. A. 1885 *In re* Cousins. Alexander *v.* Cross.

into the market and sold it during the lifetime of the annuitants: this is a result which the father could not have intended. Having regard to the circumstances, it would be a very reasonable construction that the testator's view was that after the deaths of the annuitants the son might think it advantageous to himself personally to carry on the hotel, and he intended to give to his son the option of so doing. And it would be a most unnatural construction of the words to hold that the father intended to give a vested reversionary interest subject to the payment of £10,000.

But, secondly, even if this option was intended to pass to the son's executors, it is submitted that it would be a breach of trust for the executors to exercise it. It rested with the person to whom the option was given to say whether it should be exercised by his executors. The son's will directs the investment of his estate by the executors in certain specific modes of investment, which would not include the purchase of this hotel. If they were to exercise the option, it would constitute a contract by them for the purchase of this hotel. Could such a contract be enforced? It is contended that the executors could not be compelled specifically to perform it, because the performance of it by them would be a breach of trust, and a trustee will not be compelled specifically to perform a contract which involves a breach of trust. The trustees of the father's will are in this case affected with notice of the breach of trust. The Court will not order a contract to be specifically performed, unless there is mutuality: if there is no power to enforce it against one of the parties, that party cannot enforce it against the other: *Fry* on Specific Performance (1). It is therefore contended that the son's executors are not in a position to enforce the option. The right to exercise an option is of a strictly limited nature: *Highgate Archway Company* v. *Jeakes* (2).

Marten, Q.C., and *J. M. Solomon*, for *William James Cousins*:—

If the executors of the son had a valuable option of this kind, they were bound to exercise it for the benefit of the estate, and the exercise of it would not be a breach of trust: if they could secure for their testator's estate a property worth even £20,000

(1) 2nd Ed. p. 201. (2) Law Rep. 12 Eq. 9.

for £10,000, they would be bound to do so, though possibly they might afterwards be bound to convert it into the securities authorized by the investment clause in the will. It is contended that this was clearly an option intended to be given for the benefit of the son and the son's estate, and therefore passed to his executors. It is in effect a valuable property, and if a valuable option is given to a man, it is given to him and his executors like any other valuable property, though the executors are not mentioned.

[BRETT, M.R.:—Could the son exercise the option before the deaths of the annuitants, or could he assign the option before their deaths, so that his assignee could exercise it when it arose?]

It is so contended. *Primâ facie* an option is not merely personal: an option to take a lease will pass to the assignees of a bankrupt: *Buckland* v. *Papillon* (1). The option to take a lease does not require any personal qualification before it can be exercised; it is not like an agreement to paint a picture, where the personal skill of the artist is required. An option to take a lease must be construed like a covenant, and in *Viner's* Abridgment, tit. Executors E. c. 4, it is said (2):—"Covenant to make lease to testator at the end of the term, testator dies within the term, yet it shall be made to the executor." A covenant to convey land creates an interest in land: *London and South Western Railway Company* v. *Gomm* (3). The declaration in the will that the children are to take vested interests, shews that the option was to be vested in the son as property, and therefore passed to his personal representatives. By the codicil *Henry Cousins*, the elder, in the event of his son dying in his lifetime, gave to his executors all the beneficial interest which the son would have taken if he had survived his father; the executors of the son would therefore have been entitled to exercise the option, if the son did not survive the father; and it is impossible to suppose that the father intended to put the executors in a different position, if the son survived his father.

Badcock, for the trustees.

(1) Law Rep. 1 Eq. 477; 2 Ch. 67. (2) 2nd. Ed. vol. xi. p. 434.
(3) 20 Ch. D. 562.

C. A. 1885 *In re* COUSINS. ALEXANDER *v.* CROSS.

BRETT, M.R.:—

One preliminary observation I desire to make, and that is that it is almost useless to quote a case on the construction of a contract between two persons, or any rule for the construction of a contract between two persons, in order to enable a Judge to construe a will. In a contract between two persons he has to consider what must have been the views of both. In a will he has only to construe what must have been, or what can be seen to have been, the intention of one person: and that makes all the difference in the world as to the mode of looking at the questions.

Then, again, I do not think that the question, whether an option would pass to the assignees of the person enjoying it on his bankruptcy during his lifetime assists a Judge in deciding whether it is a valuable thing only during his lifetime, or whether it is a valuable thing for his life and afterwards. That does not seem to me to help a Judge. He is driven back on the simple rules, and not upon the involved rules which are sometimes brought in to construe documents, but on the simple rules of construction and on the construction of a will.

Now the first thing, to my mind, to be considered is, what was the state of things when the testator made his will, and what was the state of things with which he was about to deal? He was an innkeeper in *Cardiff*, and he had had two hotels in his possession at the same time, and, as far as I can see, had been working them together. It is the commonest thing in the world in a large town like *Cardiff*. But, I suppose, as he grew older, he got tired of working one himself, and perhaps one by a manager, and therefore he had let one of the hotels. That must be taken into consideration. Now what is the natural desire of an hotel-keeper in a town of moderate size? It is to hold as many of the hotels in the town as he can, or at all events to have a personal influence with regard to as many as he can. For what reason? For a very good business reason, namely, that if his first hotel has succeeded to such an extent that he has a large number of customers who will follow him, he is immediately anxious, not merely to have some influence with another hotel, but to work it, and to be the person who is to have the profit, because he can take his customers with him. That is the first result that occurs to my mind,

bringing a knowledge of business to bear upon it. That is he first desire of the hotel-keeper, if it can be done. But another point is to be considered: if he cannot take his customers with him, his next fear is that, if another adverse person sets up another hotel, not only will the latter take his own customers with him, but also, that he will take the hotel-keeper's customers from him. That is a very material thing in this sort of business. Therefore, if he cannot carry on the other hotel personally, he likes to have a power over it—a power to be exercised by him personally. He cares no more for his executors than he cares for anyone else. He wants to have the power himself for the purpose of carrying on his business whilst he is alive, and therefore, if he cannot himself carry on the business, the next thing which he would like would be to be the owner, or the landlord of the other hotel, so that he might take care that the person who goes into that hotel shall be bound not to interfere with him, because it would be to the interest of that person not to interfere with his landlord in the other hotel.

Now there are two things which immediately stamp the desire of an hotel-keeper with regard to such a matter as this,—that is a desire for the purpose of carrying on his business personally. The testator had had the two hotels first of all apparently in his own possession, working them both; secondly, he had reserved with regard to this one a power over it, because he had only let it, and was the landlord. Now his son was an hotel-keeper, or is asserted to be one. I think he was one. Now what is the first thing that would be in the testator's mind if he cared about his son? Why that his son should have the same advantages as himself; that the son should either have a power of working the two hotels together, or that his son should have such an interest in both hotels that one could not be set up as a rival to the other. That is the state of things with which the testator has to deal when he is about to make his will.

Now I come to the terms of the will. He was dealing with one of these hotels, and with the other I need not trouble myself. The first thing which he does is to give an annuity out of the profits of this hotel to his wife and his sister, as long as they shall live. He does not deal with that hotel in respect

C. A. 1885 *In re* COUSINS. ALEXANDER *v.* CROSS. Brett, M.R.

of his son immediately. He has put a burden upon it, as it were, but he says: "After the decease of the survivor of them, my said wife and sister, I declare that my said son, *Henry Cousins*, shall have the option of purchasing the *Mount Stuart Hotel*, and the offices, shops, and other buildings and hereditaments purchased by me . . . . at the price of £10,000." Now if I take that plain language by itself and apply it to those facts which I have stated, what does he mean to do? In the most natural terms he does that which I say is the most probable thing which he would do, namely, he gives the son an option to enable the son to carry on his business in the way in which his father had. That is the natural meaning of the words. Now I think it is very necessary to look at the price, namely, £10,000. That is rather a large price. Although there is no evidence about it, it looks to me as if it was the real value of the hotel estimated at that time when the will was made, and as the probable value at the time when his wife and sister would die. It is a large price. This money is to go into the residue of his estate. Therefore, after all, if the testator is putting a fair price on the building he gives his son nothing except this power over his business, which is a personal advantage to him in the mode of carrying it on. It looks to me as if the whole thing was personal, and the words are the very words which a testator would use if he meant to say what I think most likely he would say. Why should I go out of my way, and look into cases in order to see that if the words were different they would have some other effect (for that is what it comes to); and why should I say that if it is something else it should have some other effect because it is something else? That is an argument that is very often used, but it is a pure fallacy.

Now how is it that the dispute has arisen? It has arisen by an accident. *Cardiff* is a wonderful place, as everybody, who has been there, knows; and *Cardiff*, for some reason or other, either by reason of the extension of the docks and other works, or by the careful superintendence and personal interest of its great proprietor, Lord *Bute*, has jumped up into a town double or treble the size that it was; not according to its natural growth, but according to a sudden artificial increase; and therefore this hotel, which probably was worth £10,000, has jumped up to a

largely increased value, and immediately there is a lawsuit, and with the admirable ingenuity of lawyers of every description they try to make out of a man's will what he did not say, and what he never thought of. I am of opinion that this was a mere personal option, and with the greatest deference to the Vice-Chancellor I cannot see that he has given any reason for saying that it is not. I cannot agree with him, and I think this appeal must be allowed.

COTTON, L.J.:—

I also am unable to agree with the Vice-Chancellor. I suppose the course of the argument here has been very much the same as it was before the Vice-Chancellor, to judge from his judgment; and the argument has really been this—that an option is a valuable thing, that that which is valuable is property, and, further, that this was part of the testator's property transmissible to his executors. Undoubtedly an option may be valuable, and in one sense it is property, but that does not at all determine how long the option is to continue, or who is to exercise it. The only question which we have to consider here is this, namely, whether the option which was given had come to an end, that is to say, whether it is an option to be exercised by the son during the limited period of his lifetime, or whether it is an option to be exercised, not only by the son, but, after he was dead, by his executors. If it is said that it is property and it goes to his executors, it is assumed that all property must last after a man's death. That is an entire fallacy. Suppose it had been a gift to him of a life interest; that is property, and it may be a very valuable property, but no one would ever suggest that that could go to his executors. The real question is, although this is property, is it such a property as can be made valuable at any time after the son's death? In my opinion it cannot. It is at an end when the son dies. I do not think it was very seriously argued that this option could be exercised during the lifetime of the widow. The benefit of it might be sold in the event of the son coming into it if he survived his mother and his aunt, and he could then exercise the option, and get the estate conveyed. But that has no bearing upon the present question. If he died during the lifetime

C. A. 1885 *In re* Cousins. Alexander *v.* Cross. Cotton, L.J.

of his mother and aunt, although he contracted that if he lived he would buy the estate, yet that could not make the option more continuing, or more exercisable, although it would be valuable, and as far as he was concerned it was converted into money. The testator was an innkeeper, and had an inn of his own, and he intended to give a certain benefit to his son. He would not have made this disposition if he had not so intended, but we must consider in what way and to what extent he has made it. He says; "after the decease of the survivor of them, my said wife and sister, I declare that my said son, *Henry Cousins*, shall have the option of purchasing the said *Mount Stuart Hotel*." In my opinion the testator intended that his son should have this option if he in his lifetime thought it for his benefit to exercise it; and then he went on to say that if his son should refuse or decline, then it was to be sold, and the money arising from the sale was to go into the residue of the estate. To my mind it was an intention to give an option to the son to say whether he would have this property at the price which the father pointed out. Of course if he was living and the price was low, he would take it; but if it was high, then he would not take it. That is the benefit which the father gives to him, but it is a benefit only to the son during the period that may elapse between the death of his mother and sister and six months after that time if he is living. In my opinion the judgment of the Vice-Chancellor cannot be supported, and the appeal is rightly brought.

Lindley, L.J.:—

I am of the same opinion. In order to understand this will, it ought to be observed that not only was the testator an hotel-keeper, and his son an hotel-keeper, but the testator devises his property, including this *Mount Stuart Hotel*, to two persons, *W. Alexander* and *Henry Cousins*, as trustees, and the trustees are to pay to the widow £500 a year, and to the sister £100 a year, and then to divide the residue amongst the testator's children. Then comes the clause which is in dispute: "And after the decease of the survivor of them, my said wife and sister, I declare that my said son *Henry Cousins* shall have the option of purchasing the said *Mount Stuart Hotel* and the offices, shops, and other buildings

and hereditaments so purchased by me as aforesaid (subject and chargeable with the payment of an annuity of £200 to Mrs. *Mary Cooper*, widow, during her life now charged thereon should she then be living,) at the price of £10,000;" and that is to fall into the residue of the testator's estate. Now the question is whether that means more than it purports to say. The language of it seems to me to be calculated to give the son a personal right to acquire this property, if he chooses, at a certain time and at a certain price. It is not in form a devise of anything more to him than that which I have mentioned. The devise is already made by the general devise to him and *W. Alexander* upon trust. But there is nothing more than the language which I have mentioned. Now it is said that that is not a personal option to him, but that it is in the nature of property which passes to his assignees in bankruptcy, if he became bankrupt, and was saleable by him, and passes to his executors. It appears to me that the bankruptcy test is by no means conclusive, nor of much assistance one way or the other. The question is, whether it was only an option which the son personally was entitled to exercise, or whether it was exercisable by his executors, administrators, or assigns. Now there is not a word in the will, which I have read, to shew that the testator intended that the son's executors, administrators, or assigns should exercise that option. The language is rather adverse to that construction, and the other parts of the will, apart from the codicil, do not, in my judgment, carry the case further. If it is a question of what is meant by benefits in the will, or rather vested interests, it leaves the matter just where it was. The question to be determined must be ascertained before the clause about vested interests is reached, and it appears to me, I confess, that an option personal to the son, as I understand it, given by the first clause, is not a vested interest within that subsequent clause. Now there is more in the codicil, because the codicil is rather wider. The codicil is this; it says, "that in the event of the death of my said son in my lifetime, all and singular the beneficial interest which he would have taken under my will had he survived me, shall go to and be vested in the executors," and so on. In one sense that, of course, is a beneficial interest; that is to say, if £10,000 is less than the value, then the right to

C. A. 1885 *In re* COUSINS. ALEXANDER *v.* CROSS. Lindley, L.J.

acquire the property at that price would be a beneficial interest. But the clause in the codicil must be taken with the one preceding it, which also throws light upon it, and which shews what the testator means. It appears to me, upon the whole, that the will is reasonably plain, that this option is personal to the son, and the codicil does not make it anything else; that is to say, the right of the son to buy this hotel at the price of £10,000 ceased to exist when the son died.

Solicitors: *I. H. Tyas & Huntington; Crowder, Anstie, & Vizard; Cunliffe, Beaumont, & Davenport.*

J. E. H.

C. A. 1885 *Feb.* 16.

In re ASPHALTIC WOOD PAVEMENT COMPANY.

LEE & CHAPMAN'S CASE.

Running Contract—Charge on Moneys payable under the Contract—Winding-up of contracting Company—Set-off—Salvage Money—Moneys payable under concurrent Contracts—Notice—Mutual Credit—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.

By the terms of a contract between the Commissioners of Sewers and a wood paving company, the company were to pave a particular street called *Victoria Street*, and the Commissioners were to pay 60 per cent. of the moneys due a month after the engineer certified the works to be complete; 30 per cent. within three months afterwards; and 10 per cent. at the expiration of two years. During the two years the company were to keep the wood surface of the roadway in repair, and if, before the expiration of the two years, the Commissioners should give them notice, the company were also to keep the roadway in repair for fifteen years upon being paid for the same at the annual rate of 6*d.* per square yard. The Commissioners were to be at liberty to retain from time to time "out of any money payable by them to the contractors," an amount equal to the above annual charge, by way of security; and in the event of failure by the company to perform the contract, the moneys retained were to be forfeited, and to be held by the Commissioners as liquidated damages for the default; and it was provided that whenever "according to the terms of this contract," any money should be due from the company to the Commissioners for damages or otherwise, the Commissioners might either sue for such money or deduct or set off the same against any money due from them to the company.

The contract being dated on the 22nd of September, 1882, the company on the 15th of November, 1882, gave to *L.* and *C.*, timber merchants, a charge on all their interest in the contract to secure a debt for goods sold

and delivered; and on the 9th of December, 1882, notice of this charge was given to the Commissioners.

On the same 9th of December, 1882, but after the notice, the company presented a petition for a winding-up order, and on the 12th and 16th of December the provisional official liquidator was empowered and ordered to complete the contract and to obtain the necessary timber on security of the moneys to be received subject to *L.* and *C.*'s charge. On the 13th of January, 1883, the winding-up order was made: on the 29th of January the liquidator, having completed the work, sent in a claim to the Commissioners, and on the 8th of March, 1883, the engineer certified the work to be complete. On the 19th of March, 1883, the Commissioners sent to the liquidator a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1*s.* a square yard, which the Commissioners considered they would have to pay for the repairs, and the 6*d.* a square yard provided for by the agreement. They also claimed to set off damages accrued and anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of any of these contracts accrued before the 27th of January, 1883. On the 25th of May, 1883, the Commissioners served the company (in liquidation) with formal notice to repair for fifteen years from the 8th of March, 1885:—

Held, that the liquidator was not entitled to a first charge on the moneys payable under the contract for the cost of completing the work incurred by him since the winding-up.

Decision of *Bacon*, V.C., reversed.

Held, further, that the chargees, *L.* and *C.*, were entitled to a charge on 90 per cent. of the moneys payable under the contract (subject as above) undiminished by any retainer or set-off by the Commissioners either under the *Victoria Street* contract or otherwise.

Decision of *Bacon*, V.C., affirmed.

Held, further, that the Commissioners might prove for their cross claim under the contract of the 22nd of September, 1882.

Decision of *Bacon*, V.C., affirmed.

Held, further, that the Commissioners were not entitled to retain any moneys due under the contract of the 22nd of September, 1882, in respect of moneys due under any of the concurrent contracts.

Decision of *Bacon*, V.C., affirmed.

APPEAL of the Commissioners of Sewers of the city of *London* from an order of Vice-Chancellor *Bacon*.

The facts of the case are fully stated in the report (1) of the proceedings before the Vice-Chancellor.

John Henderson (*Marten*, Q.C., with him), for the Appellants, the Commissioners of Sewers:—

The winding-up of a company is now governed by the law

(1) 26 Ch. D. 624.

C. A. 1885 — LEE & CHAPMAN'S CASE.

relating to bankruptcy, at least as to the debts and liabilities which are provable: *Judicature Act*, 1875, s. 10. At the time of the winding-up in the present case the *Bankruptcy Act*, 1869, was in force; and by the mutual credit clause of that statute (sect. 39) the Commissioners of Sewers are entitled to retain the sum claimed by the liquidator for work done in paving *Queen Victoria Street*, and to set off against it part of the amount claimed by them as liquidated damages; and by sect. 31 claims for damages can be proved in bankruptcy, and whatever can be proved in bankruptcy can be made the subject of set-off under the mutual credit clause: *Mersey Steel and Iron Company* v. *Naylor* (1). Then the charge created in favour of *Lee* and *Chapman* can make no difference: no money was due from the Commissioners of Sewers until after the liquidation had commenced: the assignees can be in no better position than their assignor, the time for payment had not arrived when the liquidation supervened.

[COTTON, L.J.:—The assignment had been made before the liquidation commenced; how can the mutual credit clause apply?]

The assignees, *Lee* and *Chapman*, were subject to all rights of set-off which were available against the company: *Roxburghe* v. *Cox* (2); and the notice of assignment was too late, inasmuch as it was given only on the day when the petition for the winding-up order was presented.

And, further, the Commissioners of Sewers are entitled to set off any sums of money due to them in respect of the other contracts.

Hemming, Q.C., for Messrs. *Lee* and *Chapman*:—

It was a mistake on the part of the Vice-Chancellor to give to the official liquidator a preference over Messrs. *Lee* and *Chapman*.

[He was not required to argue the other points in the case.]

Horton Smith, Q.C., and *C. H. Turner*, for the official liquidator:—

The claim of £740 15*s.* 7*d.* for completing the paving of *Queen Victoria Street* accrued due after the commencement of the winding-

(1) 9 Q. B. D. 648; 9 App. Cas. 434. (2) 17 Ch. D. 520.

up, and therefore no set-off can be allowed against it: *Ince Hall Rolling Mills Company* v. *Douglas Forge Company* (1).

[BRETT, M.R :—The decision in that case has no bearing upon this case.]

The money has been spent, and the work has been done under the orders of the Court: the expenditure has been incurred for the benefit of the estate of the company, and not for that of the Commissioners of Sewers. A line must be drawn at the winding-up; the company in liquidation is different from the company when it was a going concern. *Alloway* v. *Steere* (2) shews that there can be no set-off to any claim accruing after a bankruptcy of any claim founded on a right existing before the bankruptcy, and the liquidation of a company is now conducted upon the principles of bankruptcy. The Commissioners of Sewers want to set off sums of money which may become due; but prospective damage cannot be set off, and in point of fact it is difficult to estimate that there can be any damage. The official liquidator is entitled to be paid the sum of £740 15*s.* 7*d.* out of the £2587 5*s.* 4*d.* mentioned in the Vice-Chancellor's order. Messrs. *Lee* and *Chapman* can have no charge upon that; the assignment to them would have been worthless if the official liquidator had not completed the contract.

BRETT, M.R.:—

One point taken was whether the contract with reference to *Queen Victoria Street* carried with it any right to deduct and set off moneys, which might become due upon the other contracts with reference to the *Barbican* and some other streets. Considering the conclusion to which we have come, I do not think it absolutely necessary to give any opinion about that: whether it is so or not, will make no difference to the result of this appeal; but inasmuch as it seems to me quite clear, I do not hesitate to say, that each contract, unless there are specific words in it to the contrary, is to be confined to the subject-matter of that contract, and that the ordinary and business-like mode of reading clause 39 is that the only deductions and set-off which

(1) 8 Q. B. D. 179. (2) 10 Q. B. D. 22.

C. A. 1885 LEE & CHAPMAN'S CASE. Brett, M.R.

are to be made, are from or against any money which may then be or may thereafter become payable by the Commissioners to the contractors under this contract. That clearly seems to me to be the construction. Therefore so far I agree with the Vice-Chancellor.

But a further point is raised. The Commissioners and the company in liquidation had a contract with reference to *Queen Victoria Street*. The contract gave certain rights to the Commissioners, and it gave certain rights to the company. The company were to make the street and of course were to be paid in respect of making that street; but the company undertook certain liabilities, namely, that after the street should be finished, they would, if so requested, within two years, or in other words if notice were given to them within that period, keep the roadway in repair for fifteen years. That was the existing contract. The company had begun to make the street when they went into liquidation, but they had not so far finished making the street, as I understand it, as to entitle themselves to payment for their work: they had done a great part of the work, but in order to enable them to obtain the payment under the contract the time had not yet come. Before they went into liquidation—it signifies not how long—they had given a charge to *Lee* and *Chapman* on their interest in that contract. What was their interest in that contract? It was the money that was to come to them under that contract. Therefore they gave a charge upon that interest. Notice of that charge was given to the Commissioners before the liquidation, although the liquidation took place upon the same day. When the company went into liquidation, the liquidator evidently thought it for the benefit of the estate that he should complete the contract, so as to obtain the payment for it. He got the leave of the Court to carry on the contract. It has been argued that the company which carries on the contract, is not the same company as that which entered into the contract. Be it so: but the contract remained the same; and if the company were to carry on the contract so as to earn the money, it is obvious to my mind that they were to carry it on subject also to the liability that if they were requested so to do they were to keep the road in repair for fifteen years. But they are disabled

from performing a part of the contract, and that gives a right to the person with whom they have contracted to damages under that contract. Those damages are to be assessed when the breach is complete, and the moment when they are finally unable to carry out their part of the contract so that by no means could they reinstate themselves into the power of carrying it on, at that moment the right to damages has accrued and the damages which have then accrued ought to be assessed. Those damages are for breach of their undertaking to keep the street in repair for the future. It is difficult to assess the amount of damages, but if the case were tried before a jury, the jury would be bound to assess it; and this case being in the Chancery Division, the Judge, by means of his Chief Clerk, has assessed it in Chambers. It is suggested that the figures were wrong: even if figures were the subject matter of appeal, how could we go into it? It is almost impossible to shew that the figures are wrong, and it must be taken that they are right.

What are the circumstances under which this question arises? The liquidator sues the Commissioners for the price of the work done under the contract. The Commissioners allege that they have a claim against the liquidator for damages which have been assessed, and as against him, by virtue of the *Bankruptcy Act*, 1869, s. 39, those damages are to be considered as damages which can be set off by the Commissioners against his claim. If there were no charge upon the claim of the company, it seems to me clear upon authority and upon the true construction of this section that the damages could be set off. But then a charge has been given to *Lee* and *Chapman* before the winding-up. These damages for breach of contract until they were assessed were unliquidated. If there had been no winding-up, could they have been set off as a claim by the Commissioners against the company? Certainly not. They are not damages which can be set off under the contract. Then if they cannot be set off under the contract, the interest of the company is to have the payment for the work done not subject to this right of set-off. That is an interest on which they have given a charge to *Lee* and *Chapman*. Then how can *Lee* and *Chapman's* right which had thus been constituted before the winding-up, be altered by the winding-up? It seems to me that it cannot, that when *Lee* and *Chapman's* rights are

C. A. 1885 LEE & CHAPMAN'S CASE. Brett, M.R.

considered, the *Bankruptcy Act*, 1869, s. 39, does not apply, that *Lee* and *Chapman's* rights were constituted and became absolute before the winding-up, and that their interest under the contract cannot be altered by a right of set-off as between the company in liquidation and these Commissioners accruing after the winding-up and under the *Bankruptcy Act*, 1869. I consider, therefore, that *Lee* and *Chapman* are entitled to the amount of the charge which has been found in their favour.

Now I come to the question as between the liquidator and the Commissioners wholly irrespective of this charge, and to be considered as if this charge had never been made. That charge has diminished the amount which I now have to deal with as between the liquidator and the Commissioners. But the moment that I come to consider the rights as between the Commissioners and the liquidator, and to consider them as if no charge had been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding-up. The moment I come to that conclusion, I must hold that the *Bankruptcy Act*, 1869, s. 39, applies, and that the claim of the Commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages. Therefore as between the liquidator and the Commissioners it seems to me that the judgment of the Vice-Chancellor cannot be supported.

COTTON, L.J.:—

In this case the Vice-Chancellor has made an order which gives the liquidator a right as against the Commissioners to a sum of money payable by the Commissioners under the contract between them and the company which is being wound up, the Commissioners being allowed to retain for a couple of years a sum mentioned in the order. Then he has given the Commissioners a right of proof as against the company for a sum of £2,536 17*s.* 6*d.* in respect of the claim of the Commissioners for damages under the contract between the Commissioners and the company.

The first point may be disposed of shortly. It was said that the decision of the Vice-Chancellor was wrong, because there was the right to set off any claim for damages under any contract

whatever against the money payable to the company for work done. I quite agree with the Master of the Rolls that if one takes clause 39 of the contract of 1882 and the corresponding clauses under the other contracts which had already been entered into as regarded the *Barbican* and other streets, this clause simply applies to claims under the contract in respect of which money is claimed as due by the Commissioners to the company. To my mind that is perfectly clear.

Then I come to this other point. The company is being wound up. Is there a right of set-off under the mutual credit clause, either as against the company or as against the assignees, *Lee & Chapman*, and is the company entitled to recover the £740 15*s.* 7*d.* expended by the liquidator upon the street? Now as regards the company, that is to say as against the liquidator, in my opinion there is the right of set-off under sect. 39 of the Act of 1869 which is claimed by the Appellants. That section says that "where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings." All that applies now to proceedings in winding up companies, and under the 31st section of the *Bankruptcy Act*, 1869, claims for damages could be proved. The learned counsel for the liquidator have said that under the contract there was a right on the part of the company to receive from the Commissioners a considerable sum of money, £2587 5*s.* 4*d.* But what the Commissioners say is that the contract which gives the liquidator a right to that money contains a clause that the company shall, if it receives a notice within two years, maintain *Queen Victoria Street* for fifteen years, and that is now rendered impossible for the company to do because the company has gone into liquidation, and the amount which the Commissioners can properly claim by way of damages under the breach of that clause has been estimated. Of course that breach has not occurred actually, but the company has put itself in such a position that it cannot possibly perform the contract, and the Commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date

C. A. 1885 LEE & CHAPMAN'S CASE. Cotton, L.J.

of the completion of the work by the liquidator; in my opinion there is a claim for damages capable, as the Vice-Chancellor thought, of being proved in the winding-up. The question is whether it does not come under that mutual credit clause, sect. 39. In my opinion it does: mutual dealings in respect of which there are these cross claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the Commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding-up for the company to do that, and in my opinion, though no notice had been given before the commencement of the winding-up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the Commissioners.

But if I rightly understand the argument of the counsel for the liquidator, it was somewhat subtle. He said that it is impossible that any such notice should be given, inasmuch as one company entered into the contract under which this sum is payable, and that company no longer exists; another and different company is now going on. The liquidator can only carry on contracts which have been entered into by the company. He has adopted and acted on that contract, and it is impossible to say that a different company is acting under the winding-up to what there was before. It is true that the liquidator does many things merely as liquidator, but his right, if any, to claim this sum of money is in respect of a contract entered into by this going company, and it is only to this going company and the liquidator as its representative that any sum can be due. In my opinion, therefore, as between the Commissioners and the liquidator under the mutual credit clause there is this right of set-off.

As regards the assignees, *Lee & Chapman*, they stand in a different position. Before the commencement of the winding-up the company had assigned to them the right of receiving to the extent of their debt the money payable under the contract.

As regards that sum, there was no longer a mutual credit or the possibility of a mutual credit between the company and the Commissioners. It is very true that the sum had not then become payable because the work had not been finished, and the certificate of the engineer had not been given; but there was a handing over by the company to the mortgagees of their right to receive what was payable under this contract to the extent of their debt. To that extent the operation of the mutual credit clause does not apply. It was really a right under the contract, although under the contract the time had not yet arrived for payment of the sum payable for the paving of *Queen Victoria Street*. As against *Lee & Chapman*, the mutual credit clause cannot prevail, because it operates only as between the bankrupt and the person claiming to prove, not as between the person dealing with the bankrupt and some one to whom the bankrupt had previously assigned his interest in his contract. That in my opinion settles that point.

Then the liquidator says that he has spent £740 15*s.* 7*d.* under the order of the Court. The Court had no power whatever to bind any rights which the Commissioners had, except when the Commissioners came before it. I cannot see how it can be in any way said that the expenditure of £740 15*s.* 7*d.* could bind the Commissioners, even if that would have given any right to the liquidator. The work was done for the benefit of the estate in liquidation, in order that payment for the work already done might not be lost in consequence of the undertaking not being completed, and the engineer being entitled to refuse his certificate. It was done for the benefit of the estate, and in my opinion as against the Commissioners the liquidator cannot claim that amount. It was not done at their request, it was not done for their benefit, and as against them in my opinion this claim must fail.

Then comes the other question as between the liquidator and the mortgagees of the company. The liquidator, under the sanction of the Court, which gave him a right of indemnity as against the assets, if there are any, has spent money to secure the fund which the company has already mortgaged to *Lee & Chapman*. In my opinion it was wrong to give the liquidator, who represents the mortgagors, a claim for this sum in preference

C. A. 1885 LEE & CHAPMAN'S CASE. Cotton, L.J.

and priority to *Lee & Chapman*, who are the mortgagees of the company for money or money's worth which they had advanced to the company, and for the purposes of the works of the company. In my opinion, therefore, the order must be varied so far as it directs the £740 15*s.* 7*d.* to be paid to the liquidator. There must be the set-off, and nothing will be payable to the liquidator under this order.

LINDLEY, L.J., concurred.

The order of the Court of Appeal was as follows:—

"Upon the appeal of the Commissioners of Sewers of the city of *London* from the order dated the 8th of April, 1884, coming on this day before this Court, and upon hearing counsel for the Appellant and for the official liquidator of the *Asphaltic Wood Pavement Company, Limited*, and for Messrs. *Lee & Chapman*, and upon reading the said order dated the 8th of April, 1884, and the certificate of the fund:—

"This Court doth declare that there is no such set-off as that claimed by the Commissioners of Sewers of the city of *London*, but that there is a set-off as between the said Commissioners of Sewers and the said liquidator, on the contract dated the 22nd of September, 1882.

"And it is ordered that so much of the said order dated the 8th of April, 1884, as directs the said Commissioners of Sewers to pay to the said liquidator £740 15*s.* 7*d.* be discharged.

"And this Court doth declare that Messrs. *Lee & Chapman* are entitled to £2117, being £1900 and £217 for interest, less tax, from the 15th of November, 1882, up to the 15th of March, 1885, and that they are to be at liberty to add their costs of the said order, dated the 8th of April, 1884, and of this appeal, to their security, such costs to be taxed by the Taxing Master and to include such costs as they are entitled to as mortgagees. And the costs of the Commissioners of Sewers of this appeal are to be taxed by the Taxing Master, and paid out of the assets of the said company.

"And it is ordered that the funds in Court be dealt with as directed in the schedule hereto."

It appeared from the schedule that a sum of £2587 5*s.* 4*d.*, money on deposit was in Court, and it was directed that out of the money on deposit and interest the sum of £2117, and their costs, to be taxed, were to be paid to Messrs. *Lee & Chapman*, and it was further directed that the residue of the money on deposit and interest was to be paid to *B. Scott*, the Chamberlain of the city of *London*, on behalf of the Commissioners of Sewers of the city of *London*.

Solicitors: *Halse, Trustram, & Co.; W. H. Smith & Son; E. A. Baylis.*

J. E. H.

CAVENDISH *v.* CAVENDISH.

C. A. 1885 Feb. 19.

[1873 C. 180.]

Will—Construction—Turnpike Road Bonds—Real Security.

Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—

Held, that mortgages of turnpike road tolls and mortgages of turnpike road tolls and toll-houses were not mortgages on real security, and did not come within the exception in the bequest.

Decision of *North*, J., reversed.

APPEAL of the Plaintiff, *H. F. C. Cavendish*, from a decision of Mr. Justice *North*. The proceedings before Mr. Justice *North* are reported (1).

This was a suit to administer the estate of General *Henry F. C. Cavendish*, who by his will, dated the 28th of February, 1873, made certain specific bequests, and among them was a specific bequest to his son, the late Plaintiff, *William Henry Frederick Cavendish*, of all his moneys, stocks, funds, shares, and other securities for money, "except mortgages on real and leasehold security." Other material provisions of the will are noticed in the judgments of Lords Justices *Cotton* and *Lindley*.

Among the securities held by the testator at the time of his death were three several mortgages given by the trustees of certain turnpike roads by way of security for the repayment of money advanced and charged upon the tolls to be levied upon the said roads, and in one case, upon the toll-house built upon such roads for the purpose of collecting the tolls, as well as upon the tolls collected.

The form of the mortgages is given in the report of the proceedings before Mr. Justice *North* (1).

The late Plaintiff, *William Henry Frederick Cavendish*, having died, *Henry Frederick Compton Cavendish*, who was one of the executors of his will, was by order substituted as Plaintiff.

H. A. Giffard, Q.C., and *Bailey*, for the Plaintiff:—

The forms of assignment shew that these securities are not

(1) 24 Ch. D. 685.

C. A. 1885 CAVENDISH v. CAVENDISH.

mortgages of real or leasehold estate: they have none of the ordinary incidents of a mortgage: the only remedy is by an application for a receiver. The decision in *Robinson* v. *Robinson* (1) turned upon the language of a will, which was different from that now before the Court.

Cozens-Hardy, Q.C., and *Simmonds*, for the persons entitled to the residue:—

Robinson v. *Robinson* shews that demises of tolls are mortgages on real security: no special machinery is given by the statutes to enable the assignees of the tolls to recover the amount due to them, but the appointment of a receiver would be one mode of enforcing payment. The demises of the tolls confer incorporeal rights which would go to the heir, if the right to receive payment were not expressly limited to the executors and administrators. They are both securities and mortgages.

Bridgeman, *H. Wace*, and *Bardswell*, for other parties.

BRETT, M.R.:—

Unless I am dealing with intricate questions as to real property, and unless the words used are conveyancer's language, which has been received and adopted in a certain sense for years, I am for construing every will by itself according to the ordinary meaning of ordinary people using the English language. Let me take this will subject to that canon, which I myself believe to be the only just one. The testator bequeaths "all his moneys, stocks, funds, shares, and other securities for money, except mortgages on real and leasehold security." I think that whoever drew the will might have made the matter plainer, if he had said, "except mortgages on real and leasehold property." I should not have had the smallest doubt in that case, that what is called a mortgage on real and leasehold property means a mortgage on real, that is, freehold, property and leasehold property: it means what ordinary persons call real and leasehold property. The testator uses the words, "securities for money," and then he excepts out of them "mortgages on real and leasehold security;" now mortgages are

(1) 1 D. M. & G. 247.

within the term "securities for money:" and I cannot help thinking that he means to use the words of the exception in their ordinary sense, and that he means what ordinary people would call mortgages on the real and leasehold property, and that the word "security" there has just the same effect as "property." I think that the person who drew this will did not go into the refinement of considering whether, in point of law, money lent on turnpike tolls was money lent on real property or not. He was not dealing with matters of that kind. Any person would call the piece of parchment upon which the mortgage is drawn up a security for money; he would not call it a mortgage on real or leasehold property. Therefore, it seems to me that these mortgages are not within the exception, if this will is interpreted according to the canon of construction which I adopt, namely, that it is to be construed according to the ordinary meaning of the English language.

COTTON, L.J.:—

A question has arisen whether the exception from the bequest applied to and excluded from the gift the tolls which have been referred to, and it was argued that the Appellant could not take them. In my opinion he could. The words here used are not "except real securities," and in *Robinson* v. *Robinson* (1) all that was decided was that turnpike bonds, which included the toll-houses, would be a real security within the meaning of the will which then had to be construed by the Court. Here we have not an exception of all real securities, but the words are, "except mortgages on real and leasehold security." We must consider what the testator meant by these words. In my opinion he referred to the same description of property as is mentioned in the latter part of his will, namely, mortgages ordinarily so called, that is, conveyances of freehold and leasehold property to secure sums of money and subject to an equity of redemption. He has dealt with certain mortgages in a clause at the end of the will to which I have referred, that is to say, he has devised his freehold and copyhold hereditaments vested in him upon mortgage—so as

(1) 1 D. M. & G. 247.

C. A. 1885 CAVENDISH v. CAVENDISH. Cotton, L.J.

to prevent them from going to his heir—to his trustees subject to the equity of redemption; and he has then directed that the money secured by such mortgages shall be considered as part of his residuary personal estate. Undoubtedly he does not refer to leaseholds, but the leaseholds would vest in his executors, and they would not require any such devise as this, which merely gives to those executors as trustees the hereditaments held by the testator upon mortgage, which otherwise they would not have taken. That being so, I must construe this word "mortgages" in this part of the will fairly and reasonably, looking to the rest of the will, and looking at this circumstance also that people would not call these turnpike securities "mortgages." In my opinion these turnpike securities do not, upon the true construction of this will, come within the exception of "mortgages."

LINDLEY, L.J.:—

A difficulty unquestionably arises as to these mortgage securities. The gift is of all his moneys, stocks, funds, shares, and other securities for money, except mortgages on real and leasehold security. The testator had these securities upon tolls, and the question is whether when he used these words he intended to include these securities upon tolls under the expression "securities for money," or whether he intended to include them under the exception of the mortgages. It is not a simple question whether they are securities or mortgages. They may be mortgages; they certainly are securities. The question is into which class the testator has put them. He was at liberty to put them into any class which he liked. Can we say that he has put them into the excepted class amongst the mortgages which are not to pass? that is, can we say that these turnpike securities are mortgages in the sense in which he has chosen to except them from the "securities for money?" One of the difficulties is that these turnpike securities are called mortgages by the statutes which authorize the raising of the money. When we look at the statutes authorizing the creation of these securities, 54 Geo. 3, c. lxii., 57 Geo. 3, c. xiii., 58 Geo. 3, c. lxx., we find that they are called assignments or mortgages, and in the last-named Act, where the form of transfer is given, it is called a transfer of the

C. A. 1885 CAVENDISH v. CAVENDISH. Lindley, L.J.

mortgage. But are they mortgages in the sense in which that word is used in this will? In order to answer that question, we may look at other parts of the will, and I think that a great deal of light is thrown upon the subject by the clause to which Lord Justice *Cotton* has referred. It is quite plain that they are not within that clause. It does throw some light upon the sense in which the testator used the word "mortgages." Therefore, I have come to the conclusion that these turnpike securities are securities for money, and are not within the exception, but that the exception is confined to what is strictly meant by a mortgage on real or leasehold property.

Solicitors: *Baileys, Shaw, & Gillett; Jaques, Layton, & Jaques; J. Payne.*

J. E. H.

C. A. 1885 *July* 1.

In re FAWSITT. GALLAND *v.* BURTON.

[1885 F. 365.]

Practice—Originating Summons—Dismissal of—Time for appealing—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15; *Order* I., *r.* 1; *Order* II., *r.* 1; *Order* LV., *r.* 3; *Order* LXXI., *r.* 1—*Judicature Act*, 1873, *s.* 100.

An originating summons taken out under Order LV., r. 3, is a civil proceeding commenced otherwise than by writ in manner prescribed by a Rule of Court, and is consequently an action within the definition of that word in sect. 100 of the *Judicature Act*, 1873. Therefore an order made upon such a summons is appealable at any time within one year from its date.

AN originating summons had been taken out by *Robert Galland* claiming to be tenant for life in remainder of the estates devised by the will of the above-named testatrix *Anne E. Ferguson Fawsitt*, directed to *David Burton* and *Stephen Ellis Todd*, the executors of the said will, for an order for the administration of the real and personal estate of the said testatrix.

This summons was dismissed by Vice-Chancellor *Bacon* on the 21st of April, 1885; and *R. Galland*, on the 1st of June, gave notice of appeal against the order of dismissal.

C. A.
1885
In re FAWSITT.
GALLAND *v.* BURTON.

Hemming, Q.C., and *Russell Roberts*, for the Appellant.

On the opening of the appeal a preliminary objection was raised that the appeal was out of time, the notice of appeal not having been given within twenty-one days from the date of dismissal.

Crossley, Q.C., and *Coltman*, for the Respondents:—

An originating summons is not an action, but "a matter not being an action" within Order LVIII., rule 15, and therefore under that rule the appeal must be brought within twenty-one days. By force of Order LXXI., rule 1, which makes the provisions of sect. 100 of the Act of 1873 apply to the rules of Court 1883, and by Order I., rule 1, and Order II., rule 1, "action," when used in the rules, means a civil proceeding commenced by writ. But by the same Order LXXI., rule 1, an originating summons, authorized by Order LV., rule 3, means a "summons by which proceedings are commenced without writ." The originating summons does not, therefore, satisfy the requirements of an action.

Hemming, Q.C., and *Russell Roberts*, were not called upon.

COTTON, L.J.:—

The question for us to decide on this preliminary objection is whether an order made upon an originating summons is an order made "in a matter not being an action," and consequently one from which an appeal must be brought within the twenty-one days limited by Order LVIII., rule 15. The 100th section of the *Judicature Act*, 1873, says that "action" shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court. Then we come to the Orders of 1883. These must not be taken as being, or as intended to be, inconsistent with the provisions of the Act. Order I., rule 1, says that "all actions which, previously to the commencement of the Principal Act, were commenced by writ in the Superior Courts of Common Law at Westminster . . . . and all suits which, previously to the commencement of the Principal Act, were commenced by bill or information in the High Court of Chancery . . . .

shall be instituted in the High Court of Justice by a proceeding to be called an action." I do not understand that as saying that no proceedings but what are mentioned in that rule are to be called actions. But even if that were the case, an originating summons is a civil proceeding, and a civil proceeding commenced otherwise than by writ in manner prescribed by the rules is an action. I read Order II., rule 1, as meaning that every action is to be commenced by a writ of summons except where otherwise provided by the rules. Then we have rule 3 of Order LV., providing that certain civil proceedings shall be commenced by originating summons instead of by writ of summons; and we find in rule 1 of Order LXXI. an originating summons defined as a summons by which proceedings are commenced without writ.

Taking that definition in connection with sect. 100, we must treat an originating summons as a civil proceeding commenced otherwise than by writ in manner prescribed by one of the rules of Court, and consequently as falling within the definition of an action.

The limit of twenty-one days for appealing does not therefore apply, the order of dismissal being a final order in an action, and the preliminary objection must be overruled.

LINDLEY, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I also agree.

The appeal was accordingly proceeded with, but does not call for a report.

Solicitors: *Brooksbank & Galland; Monckton, Long, & Gardiner.*

M. W.

C. A.
1885
July 6.

In re ROBERTS.
TARLETON *v.* BRUTON.

[1881. B. 2719.]

Will—Construction—Lapse—Settlement of Shares.

A testator bequeathed the residue of his estate to trustees upon trust for a nephew and three nieces equally between them, and in case any or either of them should die under twenty-one then he directed that the share or shares of him, her, or them so dying, whether original or accruing, should go to the others or other of them, and if more than one in equal shares: "Provided and I declare that my trustees or trustee shall retain the share of each of my nieces of and in the said trust moneys upon the trusts following." Then followed trusts for the niece for life for her separate use, and after her decease as to the capital upon trust as she should by will appoint, and in default of appointment upon trust for her children who being sons should attain twenty-one, or being daughters attain that age or marry, and in default of such issue upon trust for such persons as should be next of kin to her at her decease. One of the nieces married and died before the testator, leaving a child who survived him:—

Held (affirming the decision of *Pearson*, J.), that the share of the deceased niece had lapsed, and that there was an intestacy as to it.

THIS was an appeal by *Rosetta Clara Tarleton* from a decision of Mr. Justice *Pearson* (1).

The testator, by will made in 1880, directed his trustees to stand possessed of the funds arising from the conversion and investment of his residuary personal estate "upon trust for my nephew and nieces, the said *E. T. L. Roberts* and *Harriet M. B. Roberts*, and my nieces *Josephine Grigg*, wife of *E. Grigg*, and *Clara Susannah Roberts*, equally between them share and share alike, and in case any or either of my said nephew and nieces shall die under the age of twenty-one years then I direct that the share or shares of him, her, or them so dying, whether original or accruing under this clause, shall go to the others or other of them and if more than one in equal shares: Provided and I declare that my trustees or trustee shall retain the share of each of my nieces of and in the said trust funds upon the trusts following (that is to say)." Here followed a declaration of trust for the niece for life

(1) 27 Ch. D. 346.

for her separate use with a restraint on anticipation, and after her decease upon such trusts as she, whether *coverte* or sole, should by will appoint, and in default of appointment upon trust for her children who being male should attain twenty-one, or being female attain that age or marry, equally between them if more than one, and in default of such issue "upon trust for such person or persons as shall be of kin to such niece at her decease, and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate in case of her dying intestate and unmarried, and if more than one in the same shares as they would be so entitled."

Harriet Roberts married *J. H. Tarleton*, and died in the lifetime of the testator, leaving an infant child, the present Appellant, and the question was whether one fourth share of the residue had lapsed, or whether the Appellant was entitled to it contingently on her attaining twenty-one or marrying. Mr. Justice *Pearson* held that the share lapsed.

Cookson, Q.C., and *Speed*, for the appeal:—

Mr. Justice *Pearson* decided this case on the authority of *Stewart* v. *Jones* (1), but that case is distinguishable, for the gift there was not to persons *nominatim*, and the settlement directed was only a settlement of the shares to which the testator's daughters "should become entitled." In *Unsworth* v. *Speakman* (2) Vice-Chancellor *Malins* must have decided the case on the ground of a similar distinction between it and *Stewart* v. *Jones*, and that decision governs the present case. Here the object of the testator is to divide the property into shares for the purpose of allotting them among the families.

[COTTON, L.J.:—Suppose a niece died under twenty-one leaving children, could the children take?]

We fear that they could not. "The share," we contend, refers to the share intended for the niece and her family. No niece was intended to take absolutely, and "her share" cannot therefore be construed as referring to a share to which she became entitled. If the gift had stopped short at "equally between them share and share alike," there would no doubt have been an absolute gift—

(1) 3 De G. & J. 532. (2) 4 Ch. D. 620.

C. A. 1885 *In re* OBERTS. TARLETON *v.* BRUTON.

but the whole of the will must be looked to. *In re Potter's Trust* (1) is in our favour.

[COTTON, L.J.:—The ultimate trust for the next of kin of a niece living at her death makes it unlikely that he intended the gift of a share to apply to a niece who died in his lifetime. Supposing again that a niece who survived him died without issue and without making an appointment, if there had been no limitation to her next of kin, would not her share have gone to her personal representative as a part of the absolute gift not taken away by the settlement?]

That is a nice question, and in fact turns upon the point now before the Court.

[COTTON, L.J.:—The words "Provided and I declare" seem to point at a modification of a prior gift, not at the making a new independent gift.]

That, we submit, is a thin distinction.

Cozens-Hardy, Q.C., and *L. Ryland*; *Warmington*, Q.C., and *Charles Browne*, for the Respondents, were not called upon.

W. W. Karslake, Q.C., and *W. Phipson Beale*, appeared for the trustees.

COTTON, L.J.:—

What we have to consider here, is what is the true construction and effect of the testator's will, and not what he would have said if he had contemplated the event which in fact has happened. If he had contemplated it he probably would have altered his will materially. But what we have to say is this, Where there was a settlement in terms of the share of a niece, can we say that that is a settlement not only of what she takes under the will, but also a settlement of a certain share of the estate which she would have taken if she had survived? We cannot on this will, I think, came to the conclusion that this is a direction to settle an aliquot part of the estate. There is, in my opinion, a gift to the niece absolutely if she survives the testator and attains twenty-one,

(1) Law Rep. 8 Eq. 52.

but not otherwise, and then a superadded settlement of the share which is so given to her. The trustees are directed to stand possessed of the residue upon trust, not to divide it into fourths for the benefit of the nephew and nieces, but in trust for his nephew and nieces by name in equal shares. There then follows a clause of accruer: "And in case any or either of my said nephew and nieces shall die under the age of twenty-one years, then I direct that the share or shares of him, her, or them so dying, whether original, or accruing under this clause, shall go to the others or other of them, and if more than one in equal shares." Now, to my mind, that shews that what the testator thought he had already done, (he did not see the consequences,) was to give shares to the nephew and nieces as tenants in common. Then if they survive him, and one dies under twenty-one, he gives the share of the one so dying over to the others. It is perfectly clear to my mind that the testator thought that he had here in this part of the will given to them shares which they would take so far absolutely. Then there is a pause in the gift, and he introduces the settlement in these terms: "Provided and I declare that my trustees or trustee shall retain the share of each of my nieces upon the trusts hereinafter declared." The introduction of these settlement trusts as a separate clause in the will, and not as a continuation of the terms of the original gift, helps me in the conclusion at which I have arrived, that the testator thought that he had already given shares and was here intending to restrict and limit the enjoyment of those shares by the provision which he makes as regards the settlement. There are other things in the will which tend the same way, because the ultimate limitation, in the case of a niece dying without children and without having exercised the power of appointment, to her next of kin living at her death, to my mind shews that he contemplated that the niece whose share was so settled was to be a niece who was to die after him and not before him, for it would be a most whimsical provision to give to the persons who were the next of kin at the death of a niece who died before him. There is another consideration tending the same way; supposing there had been no ultimate limitation to the next of kin of the niece, and she had survived and died without having appointed and having no children, would not the argument have been unanswerable

C. A. 1885 *In re* ROBERTS. TARLETON *v.* BRUTON. Cotton, L.J.

that there was given to her in the first part of the will an absolute interest in the estate, that the enjoyment of that was limited by the settlement, but that, so far as the settlement did not take effect, the share would go to the persons who were entitled to her personal estate? In my opinion, the testator here has given a share to the niece, and has only settled the share that she takes if she survives him and becomes a person competent to take by gift under his will.

LINDLEY, L.J.:—

I am of the same opinion. I think Mr. *Cookson* is justified in saying that this case is distinguishable from the case of *Stewart* v. *Jones* (1). The language is different, and he has pointed out the differences, but what we have to deal with is this particular will, and, apart from *Stewart* v. *Jones*, I can only come to the same conclusion as Lord Justice *Cotton*. Mr. *Speed* has put it in the only way in which it can be put favourably to this child of the niece; he says that we ought to regard this as a settlement of a share upon the niece and her children. But if anything is plain upon this will, it is plain to my mind that the settlement was only a settlement of the share of a person who survived the testator and attained twenty-one. You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes. Any other view is inconsistent with clause after clause of the will. The truth is that the event which happened is an event not foreseen or provided for. I am very sorry for it, because, although I am quite unable to say, on the construction of the language of the will, that the testator intended the child to take, of course one cannot help thinking that he believed he had made it in such a form that the child would take. That, however, is only speculation, and we cannot construe this will otherwise than I have stated.

BOWEN, L.J.:—

I agree, and I have nothing to add.

Solicitors: *Tucker & Lake; Spencer Whitehead; Irwin & Nash.*

(1) 3 De G. & J. 532.

H. C. J.

In re SWIRE.
MELLOR *v.* SWIRE.

C. A.
1885
July 15.

[1882. S. 925.]

Order—Correcting Error in Order—Order passed and entered—Order not conformable to what the Court intended.

An order of the Court of Appeal was drawn up, passed, and entered, in such a form that it might be contended to decide questions which had not been before the Court, and which it had not intended to decide :—

Held, that the Court had jurisdiction to alter the record of its order, so as to make it conformable to the order which the Court had pronounced, and the record was altered accordingly, but as the applicant had not adopted the usual and proper course of applying to vary the minutes, he was ordered to pay the costs of the application.

THIS was an action in which judgment had been given for the administration of the estate of *Samuel Swire*, who had died many years ago. Among the inquiries directed were two, which in substance were, whether the trustees had applied as income anything which was capital, and whether they had applied as capital anything which ought to be treated as income. These questions mainly related to the profits of certain collieries, the question being whether on the construction of the will the profits were payable to the tenants for life. The Chief Clerk, proceeding on the view that the profits were payable to the tenants for life, found that the trustees had not applied as income any sums which ought to have been applied as capital. *Storer*, who was the assignee of the shares of some of the persons interested in the capital, and had the conduct of the proceedings in the action, applied to vary the certificate. Vice-Chancellor *Bacon* on the 23rd of July, 1884, refused the application. *Storer* appealed. The Court of Appeal on the 17th of June, 1885, decided that according to the construction of the will the profits were given to the tenants for life, and the order on the appeal was drawn up, passed and entered in the following form on the 9th of July :—

"This Court being of opinion that according to the true construction of the will of *Samuel Swire*, the testator, the tenants for life were and are entitled to the profits, produce, and proceeds of

C. A. 1885 *In re* SWIRE. MELLOR *v.* SWIRE.

investments of profits, of the collieries known as the *Dukinfield Coal Company*, the *Kirkless Hall Coal Company*, the *Kirkless Hall Coal and Iron Company*, and the *Wigan Coal and Iron Company*, and the shares thereof, and that no part of such profits, produce and investments of profits ought to be capitalized"; discharge the order of the 23rd of July, 1884; and *Storer* electing in lieu of a dismissal of his appeal that the inquiry should be referred back to Chambers, it was ordered that the inquiry should be referred back to Chambers upon the footing of the above declaration.

Storer attended by his solicitor before the Registrar during the settling of the order, and made objections to its form, but did not state that he was going to apply to the Court to vary the minutes. On the 11th of July, he served notice of motion to vary the statement of the opinion of the Court, so as to make it read as follows: "This Court being of opinion that according to the true construction of the will of *Samuel Swire*, the testator, the tenants for life were and are entitled to the profits and produce of the collieries in which the testator was interested at the time of his death, and that no part of such profits and produce ought to be capitalized."

The Chief Clerk made his certificate on the 30th of June, 1885, and *Storer* in due course took out a summons to vary it.

The testator at his decease was entitled to shares in the *Dukinfield Company* and the *Kirkless Hall Coal Company*. After his death the *Dukinfield Company* was wound up, and the *Kirkless Hall Coal Company* added to its business the manufacture of iron, and became the *Kirkless Hall Coal and Iron Company*, and this again was amalgamated with other collieries under the style of the *Wigan Coal and Iron Company, Limited*. A question was raised whether the interests in these new concerns had not in part been acquired by the investment in them of profits belonging to the tenants for life.

It appeared clearly from a shorthand note of the judgment of the Court of Appeal on the 17th of June, that their Lordships did not intend to decide anything but the question arising on the construction of the testator's will, whether the profits of his collieries were to be treated as income payable to the tenants for life, or were to be capitalized.

Rigby, Q.C., and *Hamilton Humphreys*, for the motion.

Marten, Q.C., took the preliminary objection that the order had been passed and entered before the notice of motion had been given, and could not be altered: *Flower* v. *Lloyd* (1).

[COTTON, L.J.:—That case only decides that after the Court has heard a case, it cannot rehear it.]

If a party is dissatisfied with an order as drawn up, his course is to move to vary the minutes before it is passed and entered: *General Share and Trust Company* v. *Wetley Brick and Pottery Company* (2). The case does not come within the slip order, Order XXVIII., rule 11, for there was no slip, the form of the order having been discussed before the Registrar.

Rigby, Q.C., and *H. Humphreys*, for the motion:—

Of course the case cannot be reheard, the question is, whether the order cannot be altered so as to represent truly what the Court decided.

[COTTON, L.J.:—Can you apply to vary an order except as regards a clerical error or slip?]

Lawrie v. *Lees* (3) shews that we can.

[COTTON, L.J.:—The House of Lords does not appear to have decided the point.

LINDLEY, L.J.:—At common law there is no such thing as moving to vary the minutes, and the learned Lords might not have made the same observations if they had been acquainted with the practice in the Chancery Division, where there is a regular way of setting the order right.

COTTON, L.J.:—The Registrar has referred me to *In re St. Nazaire Company* (4).]

That case only decides that there is no jurisdiction in a Judge of the High Court to rehear. In *Singer Manufacturing Company* v. *Loog* (before the Court of Appeal, 31st of January, 1883), the Court of Appeal altered its own order as not being conformable to the order pronounced.

(1) 6 Ch. D. 297.
(2) 20 Ch. D. 130.
(3) 7 App. Cas. 19, 35, 41, 42.
(4) 12 Ch. D. 88.

C. A. 1885 *In re* SWIRE. MELLOR *v.* SWIRE.

[COTTON, L.J.:—When an order has been settled it is the duty of the Registrar to pass it unless notice is given him of an intention to apply to vary the order as settled. You did not give any such notice, and it may be a question whether you have not precluded yourself from objecting.]

The Court will not allow an order to stand which does not express what the Court intended,—an order containing a declaration on a point which was not before the Court at all. It would be very inconvenient if, when a judgment of the Court of Appeal has been drawn up embodying something which the Court never intended, there should be no way of rectifying the error but an appeal to the House of Lords. No authority contradicts the opinion of Lord *Penzance*, which appears to be according to sound reason, that every Court has an inherent jurisdiction to put its records in correct form.

[COTTON, L.J., referred to *Blake* v. *Harvey* (1).]

Marten, Q.C., and *Farwell*, for the Plaintiff:—

The words in question were introduced by the Registrar for the purpose of making the matter plain. *Storer* has throughout proceeded on the footing that there was no distinction between the collieries.

Millar, Q.C., and *E. S. Ford*, for the trustees.

Rigby, in reply:—

The order is drawn up in such a form that it may be contended to decide that the shares in the *Wigan Company* arise from investments of produce of the collieries in which the testator was interested at his decease, and that they belong to the tenants for life, as being investments of produce. That is a point for which the Respondents contend and which we dispute. We ask to have such a declaration in the order as the Court intended to make when the appeal was before it.

COTTON, L.J.:—

This is an application of a somewhat unusual nature—a motion to vary an order after it has been passed and entered. The

(1) 29 Ch. D. 827.

regular course is this, that when an order is settled any party who desires to object to the terms of it as settled should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires, and then he must move the Court, at the risk of costs, to have that variation made. It is the duty of the Registrar at once to pass and enter the order when settled, unless some of the parties state that they intend to move to vary it. It would cause great delay in the Registrar's office if any one, by simply saying, "I object to that form of order," without giving any notice to vary it, could prevent the Registrar from going on to pass and enter it. But although that is the regular course, and it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced.

The present case came before us on appeal by the present applicant from a refusal of Vice-Chancellor *Bacon* to vary the Chief Clerk's certificate, and the contention was whether the profits and produce of certain collieries in which the testator had been engaged at the time of his death were to be paid to the tenant for life as income, or whether they were to be capitalized, and she was only to have the income arising from that capitalization. It was stated before the Court undoubtedly that one of these collieries had been wound up, and that the other had afterwards changed its name with some difference of constitution, and that there had been a subsequent proceeding by means of which either this colliery or the value of it had been invested in shares in another company. But no attention was specifically called to that, though the £97,000 which the Appellant asked to have disallowed to the executors (on the ground that it had been applied as income, whereas, as he contended, it ought to have been applied as capital) was money arising from all the collieries, both those

C. A.
1885
In re
SWIRE.
MELLOR
v.
SWIRE.
Cotton, L.J.

which the testator had at the time of his death and those which were acquired subsequently by his trustees by means of or as a contination of one of those collieries. Our declaration, therefore, was undoubtedly made without special reference to those collieries which were subsequently acquired in the way I have mentioned. Our declaration was this: That upon the true construction of the testator's will the produce and profits arising from the colliery businesses in which the testator was engaged were applicable as income of the residuary estate. That is not the form in which the order was drawn up, and in which it was passed and entered, but there were introduced into the order words which are strongly objected to by the present applicant. It was put in this form: "This Court, being of opinion that according to the true construction of the will of the testator the tenants for life were and are entitled to the profits, produce, and proceeds of investment of profits of the collieries known as the *Dukinfield Colliery*, the *Kirkless Hall Coal Company*, the *Kirkless Hall Coal and Iron Company*, and the *Wigan Coal and Iron Company, Limited*, and the shares thereof." Of the two last-mentioned companies, one was a transformation of the *Kirkless Hall Coal Company*, and the other was a company which was formed by some arrangement between the owners of the *Kirkless Hall Coal and Iron Company* and other parties.

Now, if there is any question as to the investment of proceeds and profits to which we have declared the tenant for life to be entitled as income, that has not been a matter of adjudication before us. No such point was raised. If the tenant for life is entitled to produce and profits, there must be something special to prevent her getting the proceeds of the investment of profits which belonged to her; but the question whether there is anything to prevent the shares in the *Kirkless Hall Coal and Iron Company* and the *Wigan Coal and Iron Company, Limited*, from being treated as part of the capital of the testator's estate, was not before us. What we intended to decide, and did decide, was simply the construction of the will, which, of course, would apply to that which the testator had at the time of his death, and anything which is to be treated as if it had been his at the time of

his death. If there is any question as to what is to be so treated we did not decide it. I doubt whether the order as passed and entered could be construed as deciding any of those questions, but as it is considered to be doubtful whether it does not, we ought not, in my opinion, to allow this record to stand in such a form as that it may be contended that it has decided questions which were never before us, and which we never meant to decide. Therefore, in my opinion we ought to strike out from the order as passed and entered the words, "and proceeds of investment of profits," and also the reference to the collieries in which the testator was not interested at the time of his death, as they relate to what was no part of the matter then before us, and therefore do not express our judgment. But then there is this question: ought we to leave in the reference to the *Dukinfield Coal Company* and the *Kirkless Hall Coal Company*, in which the testator had an interest at his death? If we were to leave in those, striking out the other collieries named, it would be contended that we decided something which we have not decided, viz., that our judgment applied only as to the profits of the *Dukinfield Coal Company* and to the *Kirkless Hall Coal Company*. Therefore, in my opinion, we ought to leave the declaration as we made it, viz., that the tenants for life were and are entitled to the profits and produce of the collieries in which the testator was interested at the time of his death, and that no part of such profits and produce ought to be capitalized. That may lead to consequences adverse to the applicant, but it is what we really decided, and I think we have jurisdiction to alter the record so as to make it conformable to what we did decide. The order will stand as an order of the 17th of June, passed and entered on the 9th of July, for we are not now making a new order on the appeal, but simply amending the record because it does not correctly state what the order of the Court was. We make this amendment on the undertaking of the applicant that he will not take any objection to the certificate in consequence of the alteration which we have made in the record as not being made on an order properly existing on the record. As the applicant has neglected to take the ordinary and proper course for having the record set right, he must pay the costs of this application.

C. A.
1885
In re SWIRE.
MELLOR *v.* SWIRE.

LINDLEY, L.J.:—

This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal. According to the old practice there was no difficulty, because the ordinary practice in the Chancery Division was, that after a decree or order had been passed and entered, any error could be put right by an application to rehear, unless the order had been inrolled. After inrolment the Court had no power over its decree. But even then there was power to vacate the inrolment on proper grounds, and when that had been done the Court again had power over its own decree. Now, rehearing has been abolished, and inrolment has become obsolete, but does it follow from that that the Court cannot correct a blunder of the kind I have assumed? I maintain that it has such a power, and I am glad to find that Lord *Penzance* and the House of Lords have asserted it. It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.

That brings us to the question whether the order in this case as drawn up did represent correctly the order that was made. I do not think that it did. I think that words have been inserted which may, I do not say will, be used for the purpose of contending that this Court has decided points which were never drawn to its attention at all. Without going into that part of the case over again, I have listened to what Lord Justice *Cotton* has said, and I quite agree with him as to what is the proper form to be given to the order. The applicant, however, was wrong in not moving to vary the minutes, and has caused by this omission considerable difficulty, delay, and expense, and certainly we ought

to discourage applications to amend orders which have been passed and entered, when it is so easy to set them right before they have been so dealt with. It appears to me, therefore, that he ought to pay the costs, and I agree with the terms as to the certificate.

BOWEN, L.J.:—

With regard to the proper form of order, I take no part in this judgment, because I was not one of the Judges by whom the appeal was heard, but the question as to the practice and jurisdiction of the Court is too important for me not to add what I wish to add to what has fallen from the Lord Justices, in which I agree.

I should be very sorry to say anything which would lead anybody to suppose that the proper practice has been followed in this case. It is quite clear that the proper and common practice has not been followed by the applicant, and that he must accordingly pay the costs of this application. But suppose the proper practice has not been followed, is it a consequence of that that this Court has no jurisdiction over the matter to set wrong right? I think the true view is, as stated by the Lord Justice *Cotton*, that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice. The Lord Justice *Lindley* has pointed out that this power which we are now asserting is a power which was always possessed by the Courts of Chancery under the old system. On that point I say nothing. But I venture to add this, that it is a power which has been exercised for hundreds of years by the Common Law Courts, and it would indeed be strange if the power were found to have disappeared when the Court of Appeal was created by the *Judicature Act*. Lord *Penzance*, speaking as a common law lawyer, was well

C. A. 1885 *In re* SWIRE. MELLOR *v.* SWIRE. Bowen, L.J.

justified, as one would expect from a Judge of his great distinction, in saying that at common law it was always understood that the Court had the power to make these corrections. When there was any mistake which could be ascribed to the officers of the Court, judgments at common law could always be amended in the term, and in some cases after the term in which they were pronounced.

It seems to me that there is inherent power in this Court to do what is asked. I do not think it is necessary to fall back upon the rules, though I think rules might be discovered which would be found to assert the existence of this power in the Court.

This order was as follows:—

The applicant undertaking not to take any objection to the certificate of the 30th of June, 1885, on the ground that the record of the order of the 17th of June as now corrected is in different terms from the order as passed and entered, and as it stood at the date of the certificate, and to treat the certificate as a certificate made upon an order in the terms of the record as now corrected, direct the record as passed and entered to be corrected so as to stand as altered in red ink.

The alteration was in the terms of the notice of motion.

Solicitors for *Storer*: *Johnson & Weatherall.*
Solicitors for Plaintiff: *Dollman & Pritchard.*
Solicitors for Defendants: *Pritchard, Englefield, & Co.*

H. C. J.

GORDON *v.* JAMES.

C. A.
1885
July 2, 3, 22.

[1884 G. 11.]

Agency—Authority of Solicitor to receive Mortgage Money—Possession by Solicitor of Transfer Deed executed by Client.

G. and *H.* were mortgagees for £1000 on property of *S.* Their solicitors, *D. & P.*, who had the deeds in their custody, applied to the Defendant, who was also a client of theirs, saying that they believed he had £1000 to invest on mortgage, and that *G.* and *H.* wanted £1000 on a transfer of *S.*'s mortgage. The Defendant inspected the property, and being satisfied, he, on the 19th of June, 1878, sent the £1000 to *D. & P.*, who gave him a receipt for it. In July, *D. & P.* fraudulently induced *G.* and *H.* to execute a deed of transfer to the Defendant with a receipt indorsed, which deed they stated to *G.* and *H.* to be a deed of reconveyance to *S.* on his paying off the mortgage. *D. & P.* shortly afterwards handed this deed with the title deeds to the Defendant, and went on paying him interest as if they had received it from *S.*, who was in fact paying his interest to the agents of *G.* and *H.* *G.* and *H.* made no inquiry as to the mortgage, and this went on till 1883, when *D. & P.* became bankrupts, and the £1000 received from the Defendant, which had never been handed over to *G.* and *H.*, was lost. *G.* and *H.* then brought their action against the Defendant, asserting a right against the property in the nature of an unpaid vendor's lien :—

Held, by the Vice-Chancellor of the county palatine, that on the evidence in the case *D. & P.* had authority to receive mortgage money on behalf of the plaintiffs, and must be taken to have received the £1000 on their behalf, and that the action must be dismissed.

On appeal, *Cotton*, L.J., expressed great doubt (the other Judges giving no opinion on the point) whether *D. & P.*, assuming them to have authority to receive mortgage money on behalf of the Plaintiffs, could be taken ever to have, in fact, received this £1000 on their behalf.

But *held*, by the Court of Appeal, that the decision must be affirmed on the ground that as the Plaintiffs by the deed of transfer and receipt which they handed to *D. & P.* enabled them to represent to the Defendant that the £1000 which he had previously handed to *D. & P.* had come to the hands of the Plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (*D. & P.* having no authority to receive money for the Plaintiffs) the Defendant had paid the £1000 to *D. & P.* at the time when the deeds were delivered to him, since he would then have known that the Plaintiffs had not received the money.

Ex parte Swinbanks (1) distinguished.

ON the 21st of March, 1876, *F. Saunders* mortgaged a freehold property to *James Gordon* in fee to secure £1000 and interest.

(1) 11 Ch. D. 525.

C. A. 1885. GORDON v. JAMES.

This money belonged to *Gordon* as surviving trustee of *William Henderson's* marriage settlement. In September, 1877, *John Henderson* was appointed trustee in the place of the deceased trustee, and the mortgage was transferred to *Gordon* and *J. Henderson*, without disclosing the trust. *Dodge & Phipps* acted as solicitors for both parties as to the mortgage. They continued to be solicitors to the trustees, and kept the mortgage and title deeds.

On the 8th of June, 1878, *Dodge & Phipps* wrote to the Defendant *James*, who was their client, saying that they thought he had £1000 to invest on mortgage, and that clients of theirs wanted that sum on a transfer of mortgage. *James* entertained the proposal, went and looked at the property, satisfied himself as to its value, and on the 19th of June, 1878, sent the money to *Dodge & Phipps*, who gave him a receipt for it. On the 5th of July, *Dodge & Phipps* sent to *Gordon* two deeds with a letter asking him to execute them, and saying that one of them "is one of *Henderson's* mortgages for £1000, about to be paid off." On the 15th, *Dodge* sent the last mentioned deed to *Henderson* with a letter saying, "Inclosed is a deed relating to a mortgage of £1000 about to be paid off. Please execute same according to instructions annexed, and sign receipt and return same." *Gordon* and *Henderson* accordingly executed the deed and signed the receipt indorsed.

This deed was dated the 19th of June, 1878, the day on which *Dodge & Phipps* had received *James's* money, and was a transfer of *Saunders'* mortgage from *Gordon* and *Henderson* to *James* containing a release for the £1000 in the body of it, and a receipt indorsed; *James* gave evidence that the transfer and title deeds were handed to him a few days afterwards, and had been in his possession ever since.

Harmood and *Banner* were the financial agents of *Gordon* and *Henderson*, and kept the accounts of the trust estate. A member of the firm deposed that they had received the interest on *Saunders'* mortgage direct from *Saunders* till the 21st of March, 1884. An agent employed by this firm to inspect the securities in the hands of *Dodge & Phipps* discharged his duty negligently, and continued to report that the *Saunders'* deeds were in their possession long after they had ceased to be so. *Dodge & Phipps*

became bankrupt in November, 1883, up to which time they had gone on paying to the Defendant what purported to be interest on *Saunders'* mortgage. *Saunders* had no notice of the transfer till December, 1883. The £1000 never came to the hands of the Plaintiffs, but was lost in the bankruptcy.

In January, 1884, *Gordon* and *Henderson* commenced their action in the Court of the county palatine against *James*, asking for a declaration that they were entitled to a lien on the mortgaged property, or the Defendant's interest therein, for the £1000, and asking consequential relief.

The Vice-Chancellor said that it was very important to uphold the doctrine that a purchaser for value having the legal estate is not to be dispossessed except on clear notice of a prior equity or title. That, having regard to *Kennedy* v. *Green* (1) and *Cave* v. *Cave* (2), no constructive notice of the fraud committed by *Dodge & Phipps* could be attributed to the Defendant, and he was a purchaser for value without notice. That it had been contended that, having regard to *Viney* v. *Chaplin* (3) and *Ex parte Swinbanks* (4), the Plaintiffs had a charge in the nature of a lien for unpaid purchase-money, on the ground that *Dodge & Phipps* had not any authority to receive mortgage money paid them by *James* on the transfer. That *Viney* v. *Chaplin* and *Ex parte Swinbanks* had been relied upon by the Plaintiffs to shew that the authority must be express, and *Sims* v. *Brutton* (5) by the Defendant as shewing that an implied authority would suffice. That in his (the Vice-Chancellor's) opinion the authority might be given without anything in writing, and without anything more express or direct than what was to be inferred from a consideration of all the circumstances of the case. That here, having regard to the course of dealing between the Plaintiffs and *Dodge & Phipps*, as shewn by the evidence, it was sufficiently proved that authority was given to *Dodge & Phipps* to receive the mortgage moneys from time to time paid off belonging to the trust, and that the £1000 received by *Dodge & Phipps* from *James* on the transfer was received by them under sufficient authority from the

(1) 3 My. & K. 699.
(2) 15 Ch. D. 639.
(3) 2 De G. & J. 468.
(4) 11 Ch. D. 525.
(5) 5 Ex. 802.

C. A. 1885 GORDON v. JAMES.

Plaintiffs. The Vice-Chancellor went on to say that even if the absence of authority could have been relied on within a short time after the execution of the transfer, there had been such a lapse of time and such laches on the part of the Plaintiffs that they could not raise such a case now. That the Defendant might, indeed, have employed a separate solicitor, and might have given notice of the transfer to the mortgagor, but that he was not bound to do either the one or the other. His Honour could not see the force of the argument, that as no money had in fact been paid to them by the Defendant, their lien on the property must remain. The Defendant's case rested on this, that the Plaintiffs having by their deed of transfer and the indorsed receipt, acknowledged that they had received their mortgage money from the Defendant, they could not now assert as against him that the statement was incorrect. The action must be dismissed with costs.

The Plaintiffs appealed, and the appeal was heard on the 2nd and 3rd of July, 1885.

Rigby, Q.C., and *R. Neville*, for the Appellants :—

The Plaintiffs are in the position of unpaid vendors, and have a vendor's lien. *Dodge & Phipps* had no authority to receive money for them, and, even if they had, they never did receive this money on behalf of the trustees. They received it as agents of the Defendant, and it never afterwards changed hands. The claim of the Plaintiffs therefore has not been discharged. *Ex parte Swinbanks* (1) is a decided authority in our favour, and *Vandaleur* v. *Blagrave* (2) and *Parnther* v. *Gaitskell* (3) support our case.

Romer, Q.C., and *Rotch*, for the Respondent :—

The deed executed by the trustees was executed with the intent that *Dodge & Phipps* should receive the money, which they had authority to do, and the whole loss has arisen from the negligence of the trustees in making no inquiry for five years after they had executed the transfer. Although a receipt is no

(1) 11 Ch. D. 525. (2) 6 Beav. 565, 577.
(3) 13 East, 432.

estoppel, a release in the body of the deed is, unless the deed was executed as an escrow, and that contention is not open upon the pleadings. We are therefore released from the claim. The Plaintiffs' case is vendor's lien, and if a purchaser knew that the purchase-money had not in fact been paid to any one authorized to receive it, it would be fraudulent on his part to set up estoppel. In every case in which vendor's lien has been allowed it has been upon the ground that the Defendant when he acquired his interest knew that the purchase-money had not been paid.

Estoppel can be pleaded, and may be relied upon when it would not be against conscience to assert it, but it cannot be successfully set up by a person in whom it would be fraudulent to assert it: *Hughes* v. *Kearney* (1); *West* v. *Jones* (2).

[FRY, L.J.:—You say that you had a legal release from this money, and that there is no equity to prevent you from setting it up.]

Exactly. By the form of the deed they made me part with the purchase-money, and I may rely on the release if I have a clear conscience, even though I am a volunteer to the extent that the purchase-money did not reach the Plaintiffs: *Rice* v. *Rice* (3).

The cases cited upon the other side are distinguishable: *Ex parte Swinbanks* (4), which is mainly relied upon, turns on this, that the defendant knew the statement in the deed as to payment to be untrue. Here the Plaintiffs enabled *Dodge & Phipps* to represent that they had received the £1000, and there was nothing to lead the Defendant to doubt that they had.

Rigby, in reply:—

West v. *Jones* has been unfavourably observed upon by the late Master of the Rolls. The authorities shew that if *Dodge & Phipps* having no authority to receive the money, the Defendant had paid it to them at the time when he received the deeds he could not avail himself of the payment as against the Plaintiffs,

(1) 1 Sch. & Lef. 132, 135.
(2) 1 Sim. (N.S.) 205.
(3) 2 Drew. 73.
(4) 11 Ch. D. 525.

C. A. 1885 GORDON v. JAMES.

and the sending it beforehand does not make the payment better but rather worse.

July 22. COTTON, L.J.:—

This is an appeal from the Vice-Chancellor of the Palatine Court, and it involves a question of very great difficulty. The Plaintiffs are trustees, and they seek to enforce what may be called a vendor's lien as against the Defendant who has obtained from them a transfer of a mortgage, they having, through the fraud of a solicitor, who was agent both for the Defendant and for the Plaintiffs, never got the money which was to have been paid to them on the transfer of the security. It is unnecessary for us to consider whether, under the circumstances, the transfer operated to pass the legal estate in the mortgaged property, for the Plaintiffs proceed on the footing that it did, and therefore it must be taken for the purposes of the case that the deed of transfer was not delivered as an escrow, to be retained and not effectually delivered until the money was actually paid, but that it passed the legal estate at once.

The facts are these. The Plaintiffs were trustees, and part of the trust property was a mortgage for £1000, which was originally vested in *Gordon* alone, and then on *Henderson*, the other Plaintiff, becoming a trustee, was transferred to and became vested in them jointly. The trustees left everything to two firms, who acted as their agents, one being a firm of solicitors, *Dodge & Phipps*, and the other a firm of accountants, Messrs. *Harmood, Banner, & Sons*, but they contend that the only persons who could receive money on their behalf were the accountants. The whole of the difficulty has arisen in this case because an agent employed by the accountants to examine the securities in the possession of the solicitors did not take the trouble to do his duty, but simply took the report of the solicitors that they had certain securities in their possession. Neither the Plaintiffs nor the Defendant are personally guilty of any misfeasance except so far as the Plaintiffs may have been negligent in not personally attending, or not getting agents who would personally attend, to their business. And the question is which of two innocent parties is to suffer by the fraud of an agent employed by both.

In the month of June, 1878, the Defendant *James*, who employed Messrs. *Dodge & Phipps* as solicitors, was applied to by them and asked whether he had not £1000 to invest on mortgage, and was informed that clients of Messrs. *Dodge & Phipps* had got a mortgage for that amount, which they wished to transfer. On the 19th of June, 1878, Messrs. *Dodge & Phipps* received from *James* £1000, which they carried to his account, and gave him a receipt. Afterwards, on the 5th of July, *Dodge & Phipps* write to Mr. *Gordon*, and on the 15th to Mr. *Henderson*, letters, sending with them the ingrossment of a deed of transfer of this mortgage for £1000, and asking the trustees to execute it, and the letter to Mr. *Gordon* is in these terms: "Will you please execute the two deeds sent herewith in the presence of bearer. One is the conveyance of" &c. (a property with which we are not concerned) "the other is one of *Henderson's* mortgages for £1000 about to be paid off." The letter to Mr. *Henderson* was similar, and with each letter there was sent, as I have said, the transfer of the security, not a reconveyance on payment off by the mortgagor, but a transfer in the then usual form, containing in the body of it a release from the £1000, and containing a receipt indorsed, which was signed by both the trustees, *Gordon* and *Henderson*, "Received the sum of £1000, being the consideration money before mentioned to be paid to us." That deed was afterwards taken to *James*, the Defendant, was handed over to him, and with the deed there were handed to him the title deeds, which were in *Dodge's* possession and entirely under his control.

Under those circumstances the question is who is to suffer? Mr. *Dodge* never in any way transferred the £1000 to the agents to whom it ought to have gone, and never in any way transferred it to the Plaintiffs, and from that time down to the time when the fraud was discovered, the Plaintiffs never seem to have made any inquiry, and the interest was paid to their account as if the mortgage to them was still part of their securities.

The Vice-Chancellor decided the case on a close examination of the evidence, and determined that although the mere execution of a deed with an acknowledgment in the body of the deed of the receipt of the consideration, and with an indorsed receipt, would not have given authority to the solicitor to receive the

C. A. 1885 GORDON v. JAMES. Cotton, L.J.

money so as to give the transferee a good discharge, yet, under the circumstances of this case, the solicitors were entitled to receive this money on behalf of the Plaintiffs, and therefore he decided in favour of the Defendant. There is a difficulty in that view, viz. this, that even if the solicitors had the authority to receive this money on behalf of the Plaintiffs, yet, in fact, they got the money as agents of the Defendant, and there is nothing to shew that there was any alteration of the capacity in which they held it, or even that at the time when this deed was executed and handed over to Mr. *James* the money was still in their hands, so as to be capable of being considered to be received by them as agents on behalf of the Plaintiffs. I think it unnecessary, however, to enter into a consideration of the grounds on which the Vice-Chancellor decided that *Dodge* was so authorized, or to consider whether the other difficulty which I have mentioned can be got over, because, in my opinion, independently of the ground on which the Vice-Chancellor decided the case, the Defendant is entitled to succeed.

The Plaintiffs are coming here as against the legal estate to enforce their equity to a vendor's lien. Now if there are any circumstances which interpose and raise an equity against them they are not entitled to do that. There is a legal estate, they are asking as against the holder of the legal estate to enforce that which is a mere equity, and the question to my mind is this, whether they were not guilty of such negligence as raises an equity against them to prevent them from enforcing their equity as against the Defendant. When they received the transfer with the letters stating that the mortgage was going to be paid off they executed the deed, and from that time they never made any inquiry at all either of the accountants or of *Dodge* as to what had been done. If they had looked at the accounts they would have seen that the interest was still entered in their accounts as being received from the mortgagor. Now *James* had already on the 19th of June, the very day on which the deed was dated when it was filled up by *Dodge*, paid into the hands of *Dodge* his money to be invested on the transfer of a security on this very property. In my opinion, therefore, although the Plaintiffs meant no wrong, and were not parties to any wrong, yet by putting

that deed into the hands of their agent they enabled him to represent to *James* that that money, which *James* on the 19th of June had put into his hands to be invested, was really paid to them on the transfer of this security.

That being so, the case is very different from the case which we should have had to consider if *James* had paid the money to *Dodge* at the time when the deed of transfer was handed over to *James*. In that case, assuming that *Dodge* had no authority to receive money on behalf of the Plaintiffs, the Defendant would not have been protected. No representation could have been made that the Plaintiffs had received the money, and no representation by *Dodge* that he was authorized to receive the money on behalf of the Plaintiffs would have helped the Defendant if such representations were untrue. But here, when *James* had already put the money into the hands of *Dodge*, the Plaintiffs, by executing this transfer and putting it into the hands of *Dodge*, enabled him to represent to *James* (as he must be taken to have done when he handed over to the Defendant the transfer and the title deeds of this property) that the money which the Defendant had handed to *Dodge* as his agent in order to be invested in this transfer had in fact been duly paid to the Plaintiffs. In my opinion, therefore, the Plaintiffs, though dealing innocently, having by negligence put into the hands of this agent the means of representing that that money had in fact come to their hands, cannot now insist on their vendor's lien, which is inconsistent with the representation then made by their agent, and which they, by their own act, enabled him to make.

In my opinion, therefore, the decision was right, although I do not concur in the reasons given by the Vice-Chancellor.

LINDLEY, L.J. :—

I am also of opinion that the decision arrived at by the Vice-Chancellor is right. Whichever way the case is decided it is a hard one, for one of two innocent parties must suffer from the fraud of a third, both the Plaintiffs and the Defendant having been unfortunate enough to trust a dishonest man. There is no particular blame to be attached to either side, and the question which we have to consider is, which of two innocent parties

C. A. 1885 GORDON v. JAMES. Lindley, L.J.

perfectly free from all imputation of fraud, or anything of the kind, is to suffer.

Now that is a very common problem for us to solve, and I apprehend that the principle to be brought to its solution is perfectly well established. The case depends not merely upon principles applicable to the legal estate, but upon a principle common to the whole law of agency. This principle is correctly stated by Mr. Justice *Story* in his book on Agency, where he lays down as one of the principles running through the whole doctrine of principal and agent: "Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon."

The facts of this case are very simple. The Plaintiffs, Mr. *Gordon* and Mr. *Henderson*, had a mortgage upon some property belonging to a man of the name of *Saunders*, they had apparently a good deal of money out on various securities. They were in the habit of trusting Messrs. *Dodge & Phipps*, solicitors in high repute at the time, one of whom at all events turned out to be an untrustworthy man. *Dodge & Phipps*, without the slightest authority of *Gordon* and *Henderson*, and without their knowledge, wrote to Mr. *James* saying in effect that they had a security on which a sum of £1000 could be invested. Mr. *James* goes and looks at the property and satisfies himself of its value, and sends them £1000 to be invested on that property. Now, pausing there for a moment, the Plaintiffs had done nothing whatever to mislead Mr. *James*, they had never represented to him that they wanted this money, or that the mortgage was going to be paid off or transferred, or made any representations whatever. Mr. *James* cannot with truth say that he was induced to part with his money by reason of any conduct of the Plaintiffs. It had been got from him by a fraudulent pretence of *Dodge & Phipps*, for which fraudulent pretence, so far as I can see, the Plaintiffs are not responsible. But, then having got the money, *Dodge & Phipps* write to the Plaintiffs and tell them that the mortgage is to be paid off, and send them a deed to sign. Now that deed was not a reconveyance to *Saunders*. I do not complain of them for not finding that out, ninety-nine men out of one hundred who were not lawyers would not find it out. But it so happens that the deed

they signed was not in accordance with the letters, it was a transfer to *James*, and that transfer contained a statement which was not true in fact, that the Plaintiffs had received the money from *James*, and by this deed they released *James* from it and conveyed the estate to him. They sent that deed back to *Dodge*. They did not know that *Dodge* had already got £1000 from *James*, but *James* did know it, and his knowledge of that fact appears to me to distinguish this case from all others which are to be found in the books. *Dodge* then, having got *James's* money for this property, and having got the deed from the Plaintiffs, in which the Plaintiffs say they have got the money, he hands that deed and all the title deeds over to *James*. Then five years elapse before the bankruptcy of *Dodge & Phipps*, which leads to the discovery of the fraud, and for some part of that time, and so far as I know for the whole of that time, these men were in apparently good credit. What could *James* do? What can be alleged by the Plaintiffs against *James*, which entitles them to take away from him what he has got? He has got the land, he has got a release. What can be alleged against him which will entitle the Plaintiffs to say as against him "You have not got a good title as against us?" I confess that when we look at *James's* position it appears to me a safe one. He knew, although the Plaintiffs did not, that he had parted with his money to *Dodge*. The Plaintiffs told him by those deeds that they had got his money. He had no knowledge, and no reason to suppose for a moment, that that statement was not true, he had every reason to suppose that it was true. Acting upon that supposition he went on in perfect security, treating himself as owner of the property, and of course not looking after his £1000, which he would have done if his suspicions had been aroused. The Plaintiffs, by their carelessness you may say, but I should rather say by their act, enabled *Dodge* to deceive *James* and lull him into security, and prevent his having recourse to those who got his money from him by that trick. It appears to me therefore that the Plaintiffs are not in a position to say that they are entitled to any relief as against *James*. I do not see that he has in any way contributed to the Plaintiffs' loss, whereas on the other hand they have entirely misled him by their incautious act.

C. A. 1885 GORDON v. JAMES. Lindley, L.J.

The decision of this Court in *Ex parte Swinbanks* (1) was strongly, though not at all improperly or unduly, pressed upon us. But that case is distinguished from the present in this most important particular, that there the person who was in *James's* position had not paid the money. He knew, therefore, when he got the deeds with the receipt, and the recital of his having paid the money to the mortgagor, that it was not true in point of fact that the mortgagor had received his money. But here *James* did not know that the Plaintiffs had not received his money, he knew that he had given it to *Dodge & Phipps*, he did not know that they had not handed it over to the Plaintiffs. And when the Plaintiffs by the deed said that they had received it, he was entitled as against them to believe that they had.

It appears to me that this case is brought within that general principle of agency to which I have referred, that Mr. *James* ought to succeed, and that the appeal ought to be dismissed.

FRY, L.J.:—

I have, though not without some hesitation, arrived at the same conclusion. It appears to me that in this case the Plaintiffs have given the means to *Dodge & Phipps* to represent that the money which had been paid by *James* to them had found its way home to the Plaintiffs. It appears to me that *James* knew that he had paid money to the persons who were themselves recognised as agents by the Plaintiffs, and that he believed that it had found its way home to the Plaintiffs. I think the result of that would naturally be that *James* would not make that inquiry and search after the money which he would have made if he had found that after paying it to *Dodge & Phipps* it had not been invested. I think, therefore, that the Defendant *James* has an equity which he may rightly set up in this case against the equity of the Plaintiffs as unpaid vendors, and that consequently this appeal must be dismissed with costs.

Solicitors: *J. H. Lydall; Goldring & Mitchell* agents for *Cleaver, Holden, & Co., Liverpool.*

(1) 11 Ch. D. 525.

H. C. J.

COLONIAL BANK *v.* WHINNEY.

C. A. 1885 June 22, 23; July 22.

[1874 C. 1696.]

Bankruptcy—Reputed Ownership—Order and Disposition of Bankrupt "in his trade or business"—Shares in Incorporated Company—Chose in Action—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-s.* iii.

B. and *T.* were partners as stockbrokers, and their practice was from time to time to buy shares in the way of their business, and to obtain advances on them by equitable mortgage or otherwise for the purposes of their business, and for convenience the shares were generally taken in the name of *B.*, who held them as trustee for the partnership. *B.* deposited the certificates together with a blank transfer of railway shares, bought with partnership moneys, and registered in his name, with a bank to secure moneys due to the bank from the firm. *B.* and *T.* became bankrupt, and no notice of the deposit was given to the railway company until after the commencement of the bankruptcy:—

Held, that as the shares were bought with partnership moneys, and intended to be used for the purposes of the partnership business, they were at the time of the bankruptcy in the order and disposition of *B.* in his business, for that the business of the partnership was *B.*' business, although another person was associated with him in it; and further, that as no notice of the deposit had been given to the railway company, the shares were in the order and disposition of *B.*, by the consent and permission of the true owner, under such circumstances that *B.* was the reputed owner of them:

Held, therefore, that the shares must pass to the trustee in bankruptcy, unless they were taken out of the reputed ownership clause, *Bankruptcy Act*, 1883, s. 44, sub-s. iii., by the proviso excluding *choses in action* from the operation of the clause.

Held by *Cotton* and *Lindley*, L.JJ., *dissentiente Fry*, L.J., that the shares were not *choses in action* within the meaning of the proviso, and that they passed to the trustee.

Order of *Bacon*, V.C., affirmed.

W. E. BLAKEWAY and *P. W. Thomas*, members of the *Stock Exchange*, carried on business in partnership, under the firm of *P. W. Thomas & Co.*, as stockbrokers, under articles dated the 2nd of April, 1874. By these articles the partners agreed to carry on in partnership the business of stock and share brokers. By art. 13 each partner was to give his whole time to the business, and was not without the consent of his partner to be concerned in any other trade or business, nor enter into any specula-

C. A. 1885 COLONIAL BANK v. WHINNEY.

tion on his own behalf, nor engage in any speculation or business on behalf of the firm against the will of his partner: Provided that this was not to prevent either partner from making *bonâ fide* investments on his own account with his own moneys. By art. 16 all mortgages, &c., and all transfers of any sums of stock, shares, or securities taken for the benefit and on account of the firm concerning the business, were to be taken in the name of the firm, unless it should in any case be by them otherwise agreed.

One of the rules of the *Stock Exchange* forbade members to act in the double capacity of brokers and dealers.

In January, 1880, the firm subscribed for 7018 £10 shares in the *Forth Bridge Railway Company*, and the sum of £28,072 which was payable on allotment was paid out of the assets of the firm, but the shares were registered in the name of *Blakeway* alone. The company was formed by 36 & 37 Vict. c. ccxxxvii. which incorporated the *Companies Clauses Consolidation (Scotland) Act*, 1845.

According to an affidavit of *P. W. Thomas* it was part of the business of the firm to apply for and take shares in public companies on their own account, and subsequently to sell or dispose of the same or borrow money thereon, as in the course of business they might determine. He further deposed that in addition to other business they carried on a large loan business, for the purposes of which they were in the habit of borrowing on stocks and shares belonging to them, and lending again to third parties at a higher rate. That they did in fact for the purposes of their business acquire and hold and deal with stocks, shares and securities to a large amount, and that for the sake of convenience it was their practice to take stocks and shares in the name of one partner only, who held them on account of the partnership. That these shares were the property of the firm, and were acquired for the purposes of their business, and employed and used therein.

On the 1st of April, 1880, *Blakeway* deposited the certificates of these shares with the Plaintiffs to secure the balance of the account of the firm with the Plaintiffs, and gave to them at the same time a deed of transfer executed by him, with a blank for the name of the transferee.

In March, 1883, a call of £1 per share was paid on the shares out of the assets of the firm. *Blakeway* received the dividend warrants on the shares and paid them in to the account of the firm.

On the 13th of November, 1883, a further call of £1 per share was made on the shares, payable on the 1st of February, 1884. On the 28th or 29th of January, 1884, *Blakeway* absconded, and on the 30th the firm stopped payment. On the 31st of January, 1884, the Plaintiffs sent notice to the *Forth Bridge Railway Company* of the deposit, which notice was received on the 1st of February. On the 5th of February, the partners were adjudged bankrupts, the act of bankruptcy committed by *Blakeway* being his absconding, and that by *P. W. Thomas* his presentation of a bankruptcy petition on the 31st of January. On the 18th of February the Defendant was appointed trustee in the bankruptcy.

This action was brought by the Plaintiffs asking a declaration that they were entitled to a valid charge on the shares for the balance due to them from the partnership, and for consequential relief.

The Defendant gave notice of motion for the appointment of a receiver of the shares, and of the dividends accrued due or to accrue due thereon, with liberty to the receiver to pay the call and raise the amount by sale or mortgage. The motion was heard by Vice-Chancellor *Bacon* on the 28th of July, 1884, and it was agreed that it should be treated as the trial of the action. His Lordship held that the shares passed to the trustee, and dismissed the action. The Plaintiffs appealed.

Rigby, Q.C., and *Northmore Lawrence*, for the Plaintiffs, in support of the appeal:—

We admit that the blank transfer is worth nothing, and that the case must turn on the deposit of the certificates. It is said, and we cannot dispute it, that these shares were held by *Blakeway* as a trustee for the firm, but we knew nothing of that when we advanced our money, we knew nothing but the fact that they were standing in his sole name. The question now is, whether they come within the *Bankruptcy Act*, 1883, s. 44, sub-s. iii.

C. A. 1885 COLONIAL BANK v. WHINNEY.

Were they in the order or disposition of the firm or of *Blakeway?* How could they be in the order or disposition of the firm? The name of *Thomas* does not appear, and the bank knew nothing of his title. Then were they in the order or disposition of *Blakeway?* In a sense he was the reputed owner, but he was a trustee for the firm. If there had been no deposit, he could not have been held to be the reputed owner. He was a trustee, and even under the old law the doctrine of reputed ownership would not have applied. The Vice-Chancellor treated this clause as identical with the *Bankruptcy Act*, 1869, s. 15, sub-s. 5, but we contend that the two enactments differ materially. Under the earlier Act if the bankrupt was a trader, but not otherwise, goods of which he was reputed owner in a house 100 miles away would be swept in, though the trade creditors never knew or thought of them. The present Act removes this anomaly by providing that the goods must be in the order or disposition of the bankrupt "in his trade or business." *Blakeway* cannot be the reputed owner within the clause, because the shares, if they were in a trade or business at all, were in the trade or business of the firm, not of *Blakeway*. Under the old law reputed ownership applied as between a firm and its members, and so it must now. If a partner allowed the firm to have the reputed ownership of his property, the joint creditors got it, and *vice versâ*, though the latter case was not common. Suppose a firm of manufacturers at *Manchester*, one or more of the members of which were merchants at *Liverpool*. There are then two separate trades, it might well be that the goods made by the manufacturing firm got into the hands of the selling firm under such circumstances as to make them apparent owners. On the bankruptcy of the selling firm, the goods would pass to their trustees for the benefit of their creditors. The Vice-Chancellor here considered that the bank were the true owners, and that the goods were in the order and disposition of *Blakeway* or his firm, no matter which, and passed to the trustee, and that it was a mere matter of internal arrangement in the bankruptcy what class of creditors got the benefit of them. In this His Lordship ignores the words "in his trade or business." The Respondent is in this dilemma: there is no business but the business of the firm; if then he says that the shares

were in the order or disposition of the firm, he must make out that the firm were the apparent owners; which they clearly were not; if he says they were in the order and disposition of *Blakeway*, he is met by the fact that they were not in *Blakeway's* trade or business.

[FRY, L.J.:—I do not quite follow that. Is not the business of the firm *Blakeway's* business, though other people are associated with him in it?]

The bankrupt law treats a firm as an entity distinct from the individual partners, just as if it was a corporation—thus a creditor of the firm who holds a security from one partner can prove without deducting it, and the principle is carried out as regards reputed ownership: *Lindley* on Partnership (1).

[COTTON, L.J.:—Is not a man's business the business of the firm in which he is engaged, if he does not trade separately?]

Suppose these shares had belonged to *Blakeway* free from any trust for the firm, could they have been laid hold of to pay the joint creditors? Suppose he bought them with his own money, and deposited them with the bank as security for the firm's debt, if the bank gave no notice to the railway company he would be reputed owner, and the shares would be taken to pay his separate creditors, not the creditors of the firm. The Legislature did not mean to take away the property of a partner from his separate creditors in order to pay the debts of the firm with it. If property is claimed under the order and disposition clause by joint creditors, they must shew that it was employed in the business of the firm; if it is claimed by separate creditors, they must shew that it was employed in his sole business. Under the old law if one of several partners was reputed owner, say of household furniture, the joint creditors could not get it, the question must first be answered—who is the reputed owner? According to the express words of s. 44, sub-s. iii., if the property was in *Blakeway's* reputed ownership it must go to his creditors, and as the firm never had any reputed ownership, no creditor can have relied on these shares or given the firm credit on the faith of them, when they

(1) 4th Ed. p. 1156.

C. A. 1885

COLONIAL BANK v. WHINNEY.

were standing in the name of one partner, and transferable only by deed.

[COTTON, L.J.:—How do you read the words "in his trade or business"? Do they mean being assets of the business subject to the claim of the true owner—or, being employed in the business?]

We say, in the first place, that nothing can be said to be in a man's trade or business except visible things. But suppose the words to apply to incorporeal chattels they must mean employed so as to be reputed assets of the firm. Here the shares have been so dealt with as to make them appear not assets of the firm but assets of *Blakeway*. If the shares had been registered in the names of both partners they would no doubt have had reputed ownership. Suppose the firm had made a stranger their trustee, and he mortgaged to us without my knowing of the trust, we say that the firm would only have an interest subject to that mortgage.

[COTTON, L.J.:—Suppose *Blakeway* had been a sole trader and the shares had stood in his name, would they have been in his business?]

No; for his business was that of a broker, not of a dealer in shares; if he had been a jobber they would have been in his business. We say that nobody can get the benefit of reputed ownership but creditors of the reputed owner. There are no cases in point on the construction of sect. 44, sub-sect. iii., but there are some authorities throwing light on the application of the doctrine of reputed ownership between partners. In *Ex parte Dorman* (1), goods in the apparent ownership of a firm which committed an act of bankruptcy, upon which one partner was adjudicated bankrupt, but the other, being a minor, was not, were held not to pass to the trustee. In *Ex parte Watkins* (2) the existence of a custom well known in the trade was held to exclude the doctrine of reputed ownership, and Lord *Selborne* in his judgment shews that there must be a possession which conveys the reputation of ownership, and *Ex parte Wingfield* (3) carries out

(1) Law Rep. 8 Ch. 51. (2) Law Rep. 8 Ch. 520.
(3) 10 Ch. D. 591.

the same principle. *Ex parte Hayman* (1) and *In re Bainbridge* (2) illustrate the rule that the firm is looked upon as an entity distinct from the individuals composing it.

[FRY, L.J.:—Suppose *A. B.* carries on business alone in one shop, and carries on business in partnership with *C. D.* in another shop. A person leaves goods in each shop so as to create a reputed ownership, how do the goods go?]

We say that the goods in the separate shop must go to *A. B.'s* separate creditors, and those in the joint shop to the joint creditors.

There is this further point, that at the time of the bankruptcy these shares were not in the order or disposition of any one, for a call had been made which had not been paid, so that no one could transfer the shares: *Companies Clauses Consolidation (Scotland) Act*, 1845, sect. 17.

[FRY, L.J.:—Do you contend that these shares are *choses in action* and so not subject to the reputed ownership clause?]

We do. There is not much authority on the point. In *Ex parte Union Bank of Manchester* (3) it was held that shares in a company incorporated under 7 & 8 Vict. c. 110, were not *choses in action*. In *Ex parte Barry* (4) it was held that where a man had transferred his shares by way of mortgage, so that the mortgagees were legal owners, his interest in the shares was a *chose in action* and not subject to the doctrine of reputed ownership. The distinction drawn is a most arbitrary one, and it is novel that the interest of a mortgagor in what is not a *chose in action* but goods, should be held a *chose in action*. If, however, the latter decision is right it makes in our favour, for it shews the interest of the firm in those shares to be a *chose in action*.

[Sir *F. Herschell*:—*Ex parte Union Bank of Manchester* was approved by the Court of Appeal in *Société Générale de Paris* v. *Tramways Union Company* (5).]

That was nothing but a *dictum*, the question whether the shares were *choses in action* did not arise in the case and was not argued.

(1) 8 Ch. D. 11.
(2) Ibid. 218.
(3) Law Rep. 12 Eq. 354.
(4) Ibid. 17 Eq. 113.
(5) 14 Q. B. D. 424, 451.

C. A. 1885 COLONIAL BANK v. WHINNEY.

The nature of a *chose in action* is discussed by *Blackstone*, Com. (1) and the main point is, that it is a right to something not in possession. Here no possession was possible, a share is nothing but a right to receive a certain proportion of the profits of a concern.

Sir *F. Herschell*, S.G., *Marten*, Q.C., and *H. B. Buckley*, for the Defendant:—

It produces much confusion to talk of the shares being claimed by the joint creditors, or claimed by the separate creditors. The claim is by the trustee in bankruptcy, and the question among whom it is to be divided is merely one of internal administration, the whole estates joint and several are to be distributed among creditors. Till you come to sect. 59 of the Act there is nothing about joint and several creditors, we therefore say that the only question to be determined is what property passes to the trustee. There is no adjudication against a firm, each partner is made bankrupt. "Creditors" throughout the early part of the Act includes all creditors, and creditors are none the less creditors of *A.* because *B.* is also liable to them for the same debts. So as to "in his business," a business is none the less a man's business because some one else is associated in it. What it was intended to exclude was goods not connected with the business. The present case is within the very words of sect. 44, sub-sect. iii. *Ex parte Dorman* (2) is relied on against me, but it is in our favour. *Blakeway* was the only person who was reputed owner. The goods were in his apparent possession, and were employed in his business and therefore pass to the trustee.

It is said that these shares were not in the order and disposition of *Blakeway*, because calls were due upon them, and they could not be transferred as against the company until the calls were paid, but they are none the less in his order and disposition under the *Bankruptcy Act*, because immediately on payment of the calls they would have been transferred.

[LINDLEY, L.J., referred to *Greening* v. *Clark* (3), where a pledge

(1) Vol. ii. pp. 396, 442. (2) Law Rep. 8 Ch. 51.
(3) 4 B. & C. 316.

of warrants made by a man who subsequently became bankrupt, took the warrants out of his order and disposition under the 21 Jac. 1, c. 19, s. 11.]

Shaw v. *Rowley* (1) seems to be an answer to that objection. It was there held that the plaintiffs having it in their power at any time by paying the call to transfer the shares, could maintain an action of assumpsit against the purchaser of the shares. The fact that calls remained unpaid on the shares would not make a transfer invalid, its effect would be only that the transferee could not make a good title by registration until the calls were paid—but as between transferor and transferee the transfer would be good. The last question is whether these shares are *choses in action?* There is no definition of a *chose in action* in the Act. *Blackstone's* definition certainly does not include them—no such things were known in his time; a dividend on a share would no doubt be a *chose in action*, but the shares themselves are not—a *chose in action* is something which you can get only by means of action. A share in a partnership may be, but that has to be ascertained by accounts in a partnership action.

[*Northmore Lawrence*:—It has been decided in *In re Bainbridge* (2) that a share in a partnership is a *chose in action.*]

Williams on Personal Property (3) has observations as to what a *chose in action* is. In *Ex parte Huggins* (4) the question was whether a "pension" was property vesting in the trustee in bankruptcy of the pensioner, and *Jessel*, M.R. (5), says that French and Italian bonds are not *choses in action* in the ordinary sense.

[LINDLEY, L.J.:—When you are registered as a shareholder you have got that share as fully as you can by any action.

[FRY, L.J.:—An annuity has been held to be a *chose in action*: *Norcutt* v. *Dodd* (6).]

A *chose in action* means the right to a thing the enjoyment of which can be perfected only by action. The remarks of Lord Justice *Cotton* in *Société Générale de Paris* v. *Tramways Union*

(1) 16 M. & W. 810.
(2) 8 Ch. D. 218.
(3) 7th Ed. p. 148.
(4) 21 Ch. D. 85.
(5) Ibid. 90.
(6) Cr. & Ph. 100.

C. A. 1885 COLONIAL BANK v. WHINNEY.

Company (1) seem to assume that shares would be in the order and disposition clause, and a distinction (2) is pointed out between shares and *choses in action.*

[LINDLEY, L.J.:—Sect. 50 of the *Bankruptcy Act*, 1883, clauses 3 and 5, contrasts "shares" with "*choses in action.*"]

It is a general rule that a *chose in action*, with a few exceptions, *e.g.*, bills of exchange, is not assignable at law. In the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), sect. 4, again, shares are distinguished from *choses in action*: "Personal chattels shall not include . . . . nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor *choses in action.*"

[LINDLEY, L.J.:—Are these shares goods in the order and disposition of *Blakeway* in his business, while the certificates, the outward and visible sign of ownership, are not in his possession, but are deposited in the bank?]

Yes; for in all the returns made by the company *Blakeway* would be returned as owner. The decision of Vice-Chancellor *Bacon* in *Ex parte Union Bank of Manchester* (3), is a direct authority that shares in a company were not things in action within sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869, and if the law is correctly stated by him, and unless the question is affected by the introduction of the words "in his trade or business," it is an authority that the shares are goods, and in his possession with the consent of the bank as the true owners.

Rigby, in reply:—

As to the words "in his trade or business." The Solicitor-General read them in connection with "goods," as "all goods relating to or connected with the trade or business in the possession of the bankrupt."

[COTTON, L.J.:—No; rather, all goods which are for the purposes of trade or business in the possession, &c.]

There must be a possession, order, or disposition in the trade or

(1) 14 Q. B. D. 424, 446, 447. (2) 14 Q. B. D. 447.
(3) Law Rep. 12 Eq. 354.

business. The goods must be in such a condition that there is a power of disposition or control of them for the purposes of the business. You cannot look at the equities: it is of no avail to shew that the property was purchased with the money of the firm—all the equities passed to us. We are the true owners of the shares to the full extent of the value of our advances. The shares are registered in *Blakeway's* name, and for the reputation of ownership the registration in his name is conclusive. Possession means possession in trade or business, order or disposition means order or disposition in his trade or business. The possession, order, or disposition is given to him solely by registration. There is no alteration made by the new *Bankruptcy Act* as to the law of joint and separate estates—the clauses as to distribution are the same as formerly. In each case we must ask whether the order or disposition is in the trade or business, *i.e.*, whether the nature of the order or disposition is such as would enure to the benefit of the trade or business. There must be a bankruptcy of the firm as well as of the members in order to bring in the reputed ownership clauses. The Act is framed on the basis of one bankruptcy. The adjudication of bankruptcy of a firm would be in the form of separate bankruptcies of each partner. In order to make the bankrupt reputed owner, the goods must be in his sole disposition, and if the clause is to be taken literally you can never have the case of reputed ownership in a firm. The bankruptcy of the firm is the bankruptcy of the separate partners. On *A.'s* bankruptcy are the goods in his possession, order, or disposition? No, because they are in the possession of himself and his partners. But the sub-section must be intended to apply to a firm. Where goods are in the warehouse of a firm, the reputation is the reputation of the firm. To bring the clause into operation there must be a partnership possession—a partnership order and disposition. No such partnership possession could arise by the registration of these shares in the name of an individual partner.

Section 44 is identical with the section in the Act of 1869. Then are these "things in action" within the meaning of the clause. "*Choses in action*" are simply a name opposed to "*choses in possession.*"

[COTTON, L.J.:—Must it not depend on what the Act says, and

C. A. 1885 COLONIAL BANK v. WHINNEY.

does it not in sect. 50 in fact say that shares are not *choses in action* ?]

In *Ex parte Ibbetson* (1) a policy of assurance was held to be a *chose in action*, and as such was exempted from the operation of the reputed ownership clause. *Ex parte Agra Bank* (2) proceeds on the ground that shares are *choses in action*. Then as to the effect of the unpaid call. No doubt in the ordinary course, where there is not some overriding statute, the share would be said to be the property of the transferee, but at the time of the commencement of the bankruptcy these were shares with a very onerous condition attached.

July 22. COTTON, L.J.:—

This is an action by the *Colonial Bank*, who are equitable mortgagees of shares in a railway company, to enforce their security against the Defendant, who is the trustee in bankruptcy of the person in whose name the shares were standing at the commencement of the bankruptcy. The Plaintiffs being equitable mortgagees only, and no effectual notice having been given to the directors of the railway company, Vice-Chancellor *Bacon* dismissed the action, and the Plaintiffs have appealed.

The question turns upon this, whether the trustee in bankruptcy is entitled to these shares under sect. 44, sub-sect. iii., of the *Bankruptcy Act*, 1883, which one may call the order and disposition clause under the present Act. It makes applicable towards payment of the debts of the bankrupt, property which is in his order or disposition, in his trade or business, with the consent of the true owner. In the present case the *Colonial Bank*, having an equitable mortgage, were to the extent of that mortgage the true owners of those shares. The facts may be stated very shortly. These shares were at the time of the bankruptcy standing in the name of Mr. *Blakeway*, who was a partner with Mr. *Thomas* in the firm of *P. W. Thomas & Co.* These shares, though standing in the name of *Blakeway*, were bought with the money of the partnership, and it appeared in evidence that although the firm were not jobbers but brokers, yet their practice in the way of their business was to buy from time to time shares, and for the

(1) 8 Ch. D. 519. (2) Law Rep. 3 Ch. 555.

purpose of their business to obtain advances on those shares by equitable mortgage or otherwise. Those are the only facts to which I think it necessary to refer before considering the enactment and the arguments which have been addressed to us upon it. The Vice-Chancellor held that the clause applied, and that therefore the Plaintiffs failed, these shares belonging to the trustee in bankruptcy, as being in the order or disposition of Mr. *Blakeway*, and that they were applicable in payment of the debts of the two, and if there was any surplus, it of course would go to pay the separate debts. That point does not come before us now for determination, but we must deal with it in considering some of the arguments that were addressed to us. Then sect. 44, sub-sect. iii., provides that the property of the bankrupt divisible among his creditors shall comprise (*inter alia*), "all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: Provided that things in action, other than debts due or growing to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

The first argument on behalf of the Appellants was that these shares were not affected by this section, because the Defendant was a trustee for the creditors of the firm, and that what he took would go to pay the debts of the firm. There is an error of fact there. He is not a trustee in bankruptcy of the firm, he is trustee in bankruptcy of two persons who were trading together, and the argument based upon that false assumption was, that if this section was held to apply, this property would go to pay the joint debts, and not the debts of Mr. *Blakeway*. Nor, it was said, could they be in his order or disposition in his trade or business since he had no business of his own. But in my opinion the trade or business of the firm, that is to say of himself and *Thomas*, was no less his trade or business because there was associated with him in that trade or business another person, and the debts of the two would be no less the debts of *Blakeway* because some one else was liable with him. Therefore, in my opinion, that objection cannot prevail. The other matters which are requisite to

C. A. 1885 COLONIAL BANK v. WHINNEY. Cotton, L.J.

bring the case within the section are shewn to exist, and in my opinion the argument that the debts are the debts of the two jointly, and the business is the joint business of the two, while the shares are in the reputed ownership of one, does not prevent the section from being applicable.

Another objection was taken that the shares were not in *Blakeway's* order or disposition because there were calls unpaid, and the directors could prevent his transferring them until those calls were paid. In my opinion the mere liability of the shareholders to calls, which the directors could enforce by preventing the transfer until a certain sum of money was paid, does not prevent these shares being in the order or disposition of the bankrupt.

Then we come to other points which require more serious consideration, and the first is this, that the goods must be in the order or disposition of the bankrupt in his trade or business. That point first arises in this Act of Parliament. The order or disposition clause in the former Act of 1869 applied only where the man was a trader and applied to all goods which were in his order or disposition, and this was applied not only to the case of one trading alone, but to the case of one trading jointly with other or others. There is undoubtedly some difficulty in these words, "in the possession, order, or disposition of the bankrupt in his trade or business." I think that Mr. *Rigby* in his argument gave the clue to the object of the change—that the insertion of the words "in his trade or business" was intended to prevent that which occurred under the former Act, where property in the reputed ownership of a man wholly unconnected with his business was held to pass to his trustee in bankruptcy as being in his order or disposition because he was a trader. What meaning, then, are we to give to those words? Of course where the goods are in the nature of stock-in-trade there is no difficulty, goods apparently forming part of the stock-in-trade of the firm must be in the order or disposition of the bankrupt in his trade or business. But in my opinion the words go further than that. I think the true construction is that the goods must be in his order or disposition for the purposes of, or purposes connected with, his trade or business. We find that here the custom of this firm was to buy shares out of the partnership money and use them for the

partnership business, and that these shares were in fact so bought and so intended to be used (I do not rely upon the actual pledge or equitable mortgage granted to the bank for the debt of the firm), and this being so, the shares, in my opinion, were within the order or disposition of the bankrupt in his trade or business. There is no doubt here that, the bank being the true owners, the shares were within the order and disposition of the bankrupt with the consent of the true owners. There was nothing to prevent the bankrupt from dealing with these shares except the call, which I have already disposed of, and in my opinion they were in his order or disposition in his trade or business.

There is unfortunately a difference of opinion among us as to the true construction of the proviso that "things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." The question is, whether within the meaning of this section shares in a company incorporated under the *Companies Clauses Act* with power of transfer, so as to vest the shares at law in the person standing on the register, are *choses in action*. I shall not go very far back in considering what was the origin of the term *chose in action*. It is sufficient in my opinion to go as far back as *Blackstone*. After having dealt with personal property in possession, he goes on thus (1): "Having thus considered the several divisions of property in possession, which subsists there only where a man hath both the right and also the occupation of the thing, we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or *chose in action*." I may also refer to what was said, to my mind in rather plainer terms, by Mr. *Joshua Williams* in his book on Personal Property (2), where he says: "Although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the Courts of law either to recover pecuniary damages for the infliction of a wrong, or the non-

(1) Com. vol. ii. p. 396. (2) 12th Ed. p. 4.

C. A. 1885 COLONIAL BANK v. WHINNEY. Cotton, L.J.

performance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman-French of our early lawyers, a *chose* or thing in action, whilst moveable goods were denominated *choses in possession.*" Originally those *choses in action*, except in the case of *choses in action* of the Crown, could not be assigned, and they were not considered really to be property. We know how very unwilling the old lawyers were to recognise personal property; how very unwilling persons in old days were to consider personal property as of any great value, because there was very little personal property as compared with the land, which was the real property in *England* in early days.

Now if we were to stop there we should have a difficulty in seeing how it could be contended that shares of the nature of these shares can be *choses in action.* Shares are not a liberty of proceeding or a right of proceeding in a Court of law to recover damages or a debt. The case of a mere contract by the company to give shares to a person is quite different—such a contract as we often have to deal with where a man has applied for shares and they are allotted to him, but until they are put into his name all the right that he has in respect of them is a right of proceeding to have them put into his name. But, undoubtedly, there has been, not only in common language but in legal language, an extension of the application of the term, "*chose in action*" beyond its early meaning. Mr. *Williams*, Law of Personal Property (1), says: "In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant" (I do not read that as law), "whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the Acts of Parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action.* They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their

(1) 12th Ed. p. 7.

classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities." Mr. *Williams* there states, what is undoubtedly a fact, that we find things not originally coming within the description applicable to *choses in action* acquire that name, and there is a case which may be relied upon by the Appellants, *Ex parte Agra Bank* (1), where Lord *Hatherley*, a judge of no little authority, in dealing with the question whether shares were in the order and disposition of a bankrupt, referred to the principles applicable to *choses in action*. After mentioning *Ex parte Richardson* (2), he says (3): "I apprehend the principle of that case to be, that the first question, where there is an assignment of a *chose in action*, is whether the party who owes the debt or duty, as in the present case the directors of the company in which the shares were held, has had distinct and formal notice of the assignment." Now, in my opinion, he did not intend to decide, and he certainly did not in terms decide, that such shares were *choses in action*, but he only applied by way of analogy, cases where there had been either an assignment of *choses in action*, or a question whether *choses in action* were within the order and disposition of the bankrupt. If *choses in action* were assigned and no notice was given to the party who owed the debt, then they would be within the order or disposition of the bankrupt, and by parity of reasoning, if shares which were transferable subject only to the check of the board of directors were equitably incumbered without any notice being given to the directors, it was held that they were within the order or disposition. But I cannot look upon that as a decision that shares are properly *choses in action*. Moreover, the question is not whether generally shares are included in the term *choses in action*, but whether on the true construction of this portion of the *Bankruptcy Act* shares are intended to be so included. In considering this we ought to refer to any other passages of the Act where *choses in action* are mentioned, and see whether they throw any light upon the question in what sense the expression is intended to be used, and the language of sect. 50, though by no means conclusive, tends to support the view that the Legislature did not intend in this Act to include shares under the term *choses in action*.

(1) Law Rep. 3 Ch. 555. (2) Mont. & Ch. 43.
(3) Law Rep. 3 Ch. 558.

C. A. 1885 COLONIAL BANK v. WHINNEY. Cotton, L.J.

Sub-sect. 3 says: "Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt." Then sub-sect. 5 says: "Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee." Now it is very true that sub-sect. 3 may refer to *choses in action* which are transferable only under the rules of the society or the body, and sub-sect. 5 may apply to others. Therefore, as I said, the argument from this section is not conclusive, but the language, in my opinion, shews that the Legislature when passing this Act had before them a distinction between *choses in action* and shares transferable in the books of a company.

There is another difficulty in the way of the Appellants which, to my mind, cannot be got over. In the year 1871 Vice-Chancellor *Bacon*, in *Ex parte Union Bank of Manchester* (1), decided that under a similar exception in the corresponding portion of the *Bankruptcy Act* of 1869 shares were not included in "*choses in action*." In my opinion, Parliament must be taken to have known of that decision, and if they did not intend the same construction to be put upon the expression "*choses in action*" in this Act as had been put upon it in a precisely similar proviso of the former Act by a decision which had stood unimpeached for so many years, they would have inserted something to shew that intention, and would not have framed this proviso in the same terms as that of the former Act. It was said that the decision in that case was at variance with what was laid down by the Court of Appeal in *Ex parte Agra Bank* (2), but in my opinion, for the reasons I have already given, it was not.

In my opinion, therefore, these shares are not within the exception of *choses in action*, and the dismissal of the action by the Vice-Chancellor was right.

LINDLEY, L.J.:—

I have come to the same conclusion. The case is one of very great practical importance. The facts which have to be borne

(1) Law Rep. 12 Eq. 354. (2) Law Rep. 3 Ch. 555.

in mind have been stated already, and I need not repeat them. It is quite sufficient to say that the question relates to certain shares in the *Forth Bridge Railway Company*, which is a Scotch railway company, governed by an Act of Parliament which, for the purpose of our decision, may be treated as substantially the same as the *Companies Clauses Act*. Those shares stood registered in the name of Mr. *Blakeway*, who was one of the partners in the firm of *Thomas & Co.*, the other partner being *Thomas*. The certificates of the shares with blank transfers had been deposited in the ordinary way of business with the Appellants, the *Colonial Bank*, as a security for advances to the firm. The bank held those certificates. They were not registered owners, and they gave no notice of the deposit to the railway company until too late, not having given it until after the commencement of the bankruptcy. That notice, therefore, may be disregarded.

Under those circumstances, *Thomas* and *Blakeway* having become bankrupt, the question arises whether the bank can or cannot sustain their right in equity to those shares, or whether they pass to the trustee in bankruptcy free from all claims of the bank. In order to determine that question we must look to the clause of the present *Bankruptcy Act*, which differs somewhat from the similar clause in the Act of 1869. The clause in the Act of 1869, so far as regards reputed ownership, was confined to traders. The clause in the present Act is extended to non-traders, and that extension has given rise to a little variation in the language of the two sections. But, both in the Act of 1869 and in the present Act, there was an exception relating to *choses in action*, which is worded in both Acts precisely in the same way, and which will have to be considered.

The first question which we have to consider, in looking at the 44th section, sub-sect. iii., of the present *Bankruptcy Act*, is whether these shares are goods which at the commencement of the bankruptcy were "in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." We must spell through the whole of this language to see whether or not these shares come within it. To ascertain whether these shares are "goods" within the

C. A. 1885 COLONIAL BANK v. WHINNEY. Lindley, L.J.

meaning of the clause, we must look at the interpretation clause, sect. 168. It says that "'goods' includes all chattels personal." For this purpose, therefore, it is not material to consider whether shares can or cannot be properly regarded as *choses in action*. Assuming they are *choses in action*, they are still goods, and *choses in action* were held to be included in the expression "goods and chattels" in all the *Bankruptcy Acts* from the time of *James* I. downwards.

That does not conclude even the preliminary inquiry, because we have to consider whether these shares were "in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." They were standing in the name of *Blakeway*. Were they in his trade or business? That they were in his possession, order, or disposition is plain from this, that he might have transferred them to any *bonâ fide* holder for value without notice, who, upon being registered, would have got a perfectly good title against the bank or anybody else. So far there is no difficulty. But were they in his trade or business? There, I confess, there is a difficulty, and the first thing to be ascertained is what is meant by a thing being in a man's trade or business. One question is, whether that expression is applicable to any but visible things. There is no difficulty in understanding that goods and chattels in the ordinary sense, visible things in any shop or factory, are in a man's trade or business, and it was ably contended by the Appellants that nothing was in a man's trade or business within the meaning of this section which was not visible. I am bound to say that I do not think that the true interpretation of this section. I think it is narrower than the language warrants. I quite understand that, in an ordinary case, stocks, or funds, or shares standing in a man's name are not in his trade or business. Take, for example, a grocer. Stock or railway shares standing in his name could hardly be considered to be in his trade or business: they have nothing to do with it. But in the present case, the circumstances of which are very peculiar, these shares were in the bankrupt's trade or business if shares ever can be so. They were bought with partnership money, and though registered in *Blakeway's*

name for the sake of convenience, they were partnership assets, they were acquired for the purposes of the business, and they were used for the purposes of the business. If, then, the language "in his trade or business" means, as I think it does, not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes, then these shares were in Mr. *Blakeway's* trade or business. It is argued that they were not in his trade or business, but in the trade or business of the firm in which he was a partner. But I do not think that the language of the Act is to be read so narrowly as that. If I have a partner the partnership business is my business, although it is also my partner's business, and these shares would have been in Mr. *Blakeway's* business if he had been the sole member of the firm. I cannot think that they are less so for the purposes of this question by reason of his having a partner who shares in that business.

We have, then, to consider whether they were "in his possession, order, or disposition by the consent and permission of the true owner." But for the pledge of the certificates, I am not sure that there would be a true owner, within the meaning of this clause. But here there is a true owner, for the decisions which relate to these deposits, which decisions it would be too late now to question, even if we were disposed to do so, establish that a person who has a charge upon property of this kind is the true owner within the meaning of such clauses as this. We find, therefore, so far as I can work out the first part of this problem, that these are goods which at the commencement of the bankruptcy were in the possession, order, or disposition of Mr. *Blakeway* in his trade or business, by the consent and permission of the bank, who are the true owners within the meaning of the enactment.

Then we come to a question of still greater difficulty, whether these shares are taken out of the operation of the clause by the proviso: "Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." That raises the question whether railway shares standing in the name of the bankrupt are *choses in action* within the

C. A. 1885 COLONIAL BANK v. WHINNEY. Lindley, L.J.

meaning of that clause, and I have come to the conclusion that they are not. My reasons are shortly as follows. It is difficult to find out the exact meaning of the expression "*chose in action.*" One has to look back and see what the interpretation to be put upon those words is, and it is impossible, I think, to look into the authorities upon this subject without seeing that the meaning attributed to the expression has been expanded from time to time. So far as I can make out, the words "*chose in action*" were originally used to denote a mere right to sue for a debt or for damages. That is the substance of what is said on the subject in the old book "*Termes de la Ley.*" I take that not to be so much a definition as a description, and, as I understand it, the original idea was that a *chose in action* was not property of a particular class, but was no property at all. It was not that property was divided into *choses in action* and *choses in possession,* but that a *chose in action* was only a right to sue as distinguished from property. This appears to me to be made tolerably plain by the circumstance that you could not be punished for stealing a bond, or a bank note, or a Treasury warrant, or anything of that sort, until stealing such things was made a larceny and punishable by 2 Geo. 2, c. 25, s. 3. Before that statute, although, of course, a man was guilty of larceny if he stole a guinea, he was not guilty of larceny if he stole a bank note, the theory being that it was not property. There were all sorts of fanciful reasons given for it, for instance, that the paper was not worth twopence. But that was not true of a bank note which was negotiable by Act of Parliament, and it seems strange to say that a bond was not worth more than the paper upon which it was written, when it made a sum of money payable to the person whose name appeared upon it. But the true reason is that which is stated in *Russell* on Crimes (1), that these things were not regarded by law as property, and therefore were not the subject of larceny. Neither, for the same reason, could they be seized under a *fi. fa.* as was decided with regard to bank notes so late as in *Knight* v. *Criddle* (2). Neither were they assignable except under special circumstances. There were special exceptions no doubt, for the Crown could assign a *chose in action,* and by the custom of merchants bills of exchange were

(1) 5th Ed. vol. ii. p. 217. (2) 9 East, 48.

transferable. It seems to me, therefore, that *choses in action* were not regarded as a class of property but as something which was not property. A grant of goods and chattels of felons did not include *choses in action*: *Rex* v. *Sutton* (1); nor apparently did it include stock in the funds: *Rex* v. *Capper* (2). This further obscures the meaning of "goods and chattels," because whatever may be the meaning of those words in certain Acts of Parliament it is clear that "goods and chattels" in the old reputed ownership clauses included *choses in action*.

Now we pass on, and we find that *choses in action* had been held to pass under "goods and chattels" under certain statutes. It was decided in *Slade's Case* (3) that under the 17 Edw. 2, c. 16, they were forfeited under the description of "*omnia catalla*;" and in *Bullock* v. *Dodds* (4) there is a very instructive judgment upon the point. They were held in *Ford and Sheldon's Case* (5) to be goods within the statute 29 Eliz. c. 6, which forfeited the goods of popish recusants to the Crown, and on the strength of that it was held in *Ryall* v. *Rowles* (6) that *choses in action* passed under a reputed ownership clause which mentioned only goods and chattels. Passing on we find that *choses in action* are not goods, wares and merchandise within the *Statute of Frauds*: *Benjamin* on Sales (7). That is intelligible. Nor are shares in companies, goods, wares, or merchandise within that Act: *Humble* v. *Mitchell* (8); *Duncuft* v. *Albrecht* (9); nor were they goods and chattels within 13 Eliz. c. 5, relating to settlements made to defraud creditors, *Dundas* v. *Dutens* (10); *Grogan* v. *Cooke* (11), because they could not be seized by creditors. The term "*chose in action*" has then, no doubt, whatever its original meaning may have been, come to be used as denoting a certain class of property. There being no word to denote incorporeal personal property, the meaning of the expression "*choses in action*" was gradually extended for the purpose of denoting it, and Mr. *Joshua Williams* in his work on Personal Property (12) treats it as

(1) 1 Wm. Saund. 275, b & c.
(2) 5 Price, 217, 263.
(3) 4 Rep. 92 b.
(4) 2 B. & Ald. 258.
(5) 12 Rep. 1.
(6) 1 Ves. Sen. 348.
(7) Part II., ch. II.
(8) 11 Ad. & E. 205.
(9) 12 Sim. 189.
(10) 1 Ves. 196.
(11) 2 Ball & B. 230.
(12) 9th Ed. pp. 6, 20.

C. A. 1885 COLONIAL BANK v. WHINNEY. Lindley, L.J.

including even copyrights and patents. No little confusion has arisen from this extended use of the expression "*chose in action*" and where these words are used, it is necessary to be careful in ascertaining whether they are used in the wide sense of incorporeal personal property, or in the narrow and strict sense of a right to sue for a debt or damages. Though debts, money in the funds, shares in companies, copyrights and patents are all incorporeal personal property, they are so different in their nature and legal incidents, that care must be taken not to be misled by giving them all a common name which conceals their differences. We all know that our law has not been put into a very scientific shape, and there is often considerable difficulty in determining in what sense a particular expression, such as "*chose in action*," is used.

What principally leads me to the conclusion that shares in incorporated companies are not *choses in action* within the meaning of the clause we are now considering is this: precisely the same question arose under the Act of 1869, for although the early part of the reputed ownership section in that Act differed a little from the corresponding part of the sub-section, with which we are now dealing, the exception relating to *choses in action* was worded in precisely the same way; and shortly after the Act of 1869 Vice-Chancellor *Bacon* decided, in the case of *Ex parte Union Bank of Manchester* (1), that a share in a company governed by the *Companies Act* of 1862 was not a *chose in action*. He puts it in this way: such shares are not *choses in action* at all, but are as much the bankrupt's property as if they had been freehold estate. This decision seems to me to be right, for I confess that I feel a difficulty in seeing what the registered owner of a share can recover by action. He has the ownership of the share, and he cannot get anything more than he has got already. If he is kept out of his dividends he can bring his action for those dividends. They may be *choses in action*, that I can understand, but he cannot sue for the share, as he has it already. This appears to me to shew that it cannot be a *chose in action* in the ordinary sense, although I do not say that it may not be so in the extended and loose sense of that expression. That decision of the Vice-Chancellor was given in 1871, and has never been appealed from or judicially dissented

(1) Law Rep. 12 Eq. 354.

from. After it had thus stood for years the present Act of 1883 was passed. I do not think we ought to suppose the draughtsman of that Act to have been unaware of the construction which had been put by the Court upon the Act of 1869, and it appears to me that it would be a very strong thing for us to say that the language used in the Act of 1883 ought to be construed differently from the judicial construction which had been put on the same language in the Act of 1869. That conclusion is somewhat fortified by sect. 50, to which Lord Justice *Cotton* referred, in which *choses in action* are mentioned, and shares in companies are also mentioned, which looks as if the expression *choses in action* in the present Act was not used in such a wide sense as to include incorporeal chattels of every kind.

For these reasons it appears to me that the decision of the Vice-Chancellor was right, and that the appeal ought to be dismissed.

FRY, L.J.:—

One of the questions argued before us on the present appeal has been, whether the shares in question in this case are or are not *choses in action*, within the meaning of those words as used in the 3rd sub-section of the 44th section of the *Bankruptcy Act*, 1883.

The shares in question are shares in a company constituted by Act of Parliament which incorporates the *Companies Clauses Consolidation Act*, and that Act declares that shares are personal property, transmissible as such, and furthermore provides for the transfer of the shares by deed in a specified manner.

The first question is whether, according to the ordinary legal meaning of the words "things in action," which I take to be technical words, they include such shares as those in controversy. This leads to the consideration of some very elementary points in English law. According to my view of that law, all personal things are either in possession or in action. The law knows no *tertium quid* between the two. "No chattel," says Lord *Coke*, in *Fulwood's Case* (1), "either in action or possession, shall go in succession," as if the two alternatives were the only possible ones.

(1) 4 Rep. 65 a.

C. A. 1885 COLONIAL BANK v. WHINNEY. Fry, L.J.

"Property in chattels personal," says *Blackstone*, "may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in action; where a man hath only a bare right, without any occupation or enjoyment" (1), and so Lord *Hardwicke* in the great case of *Ryall* v. *Rolle* (2), speaks of personal property whether in possession or action only, as equivalent to all kinds of personal property. The expression "*choses in suspense*," is found in *Brooke's* Abridgement, in conjunction with *choses in action*: but, so far as I can understand, the two expressions are synonymous.

It has been suggested that the expression "*choses in action*" was originally only applicable to debts; and that by a lax usage it has acquired a secondary and wider significance. I am not able to adopt this view. The article "*Choses in Action* and *Choses in Suspense*," in *Brooke's* Abridgement (3), seems to shew that as early as 5 Edw. 4, the expression was held to include the King's right to the marriage of his ward; in 9 Hen. 6, the property in deeds in the hands of a third person was considered as a *chose in action*; and in the 33 Hen. 8, the classification of *choses in action* into real, personal, and mixed, was recognised. Indeed, the whole article appears to me inconsistent with the notion that according to early usage the expression was confined to debts. On the contrary, that early usage appears to me to have been as wide as the modern usage, as explained by Mr. *Joshua Williams* in the passage which has been cited by Lord Justice *Cotton*.

What, then, is the character of a share in a company? Is it in its nature a *chose in possession*, or a *chose in action?* Such a share is, in my opinion, the right to receive certain benefits from a corporation, and to do certain acts as a member of that corporation; and if those benefits be withheld or those acts be obstructed, the only remedy of the owner of the share is by action. Of the share itself, in my view, there can be no occupation or enjoyment; though of the fruits arising from it there may be occupation, enjoyment, and manual possession. Such a share appears to me to be closely akin to a debt, which is one of the most familiar of *choses in action*; no action is required to obtain the right to the

(1) Bl. Com. book 2, c. 25, p. 389. (2) 1 Atk. 165, 182.
(3) Fol. 140.

money in the case of the debt, or the right to the dividends or other accruing benefits in the case of the share; but an action is the only means of obtaining the money itself or the other benefits in specie, the right to which is called in one case a debt and in the other case a share. In the case alike of the debt and of the share, the owner of it has, to use the language of *Blackstone*, "a bare right without any occupation or enjoyment." A debt, no doubt, differs from a share in one respect, that it confers generally a more limited right than a share, and that when once paid it is at an end; but this distinction appears to me immaterial for the purpose now in hand.

It is true that unassignability by act *inter vivos* has been a character of many *choses in action* in the earlier stages of our law. But the question whether a personal thing is or is not assignable, is not, in my opinion, a criterion of whether it is in possession or in action. The King has always been able to assign *choses in action* that are certain. Bills of exchange have been assignable by our law ever since the law merchant on that point was recognised by our Courts hundreds of years ago; many *choses in action* have long been assignable by statute, such as promissory notes and bail and replevin bonds, and by the *Judicature Act* of 1873 all debts and other legal *choses in action* were made assignable in the manner therein indicated. With great deference to those who think otherwise, I consider that the power of transfer conferred on the holder of these shares by statute does not affect the question.

Furthermore, on the question whether a particular property is a *chose in action* or not, I think it immaterial to inquire whether the right in question was formerly enforceable at law or in equity; a right of suit is equally a *chose in action*, whether the forum be legal or equitable.

Turning now to authority, I find that in the case of *Humble* v. *Mitchell* (1839) (1) the question arose whether shares in a joint stock company were goods, wares, or merchandise within the meaning of the 17th section of the *Statute of Frauds;* and in determining that they were not, Lord *Denman* observed that shares in a joint stock company like this are mere *choses in action;* and in this judgment Justices *Patteson*, *Williams*, and *Coleridge* concurred. Again,

(1) 11 Ad. & E. 205.

C. A. 1885 COLONIAL BANK v. WHINNEY. Fry, L.J.

in *Ex parte Agra Bank* (1868) (1), a question arose as to certain shares in the *San Pedro Mining Company* being in the order and disposition of the bankrupt *Worcester*. Though the precise constitution of the company is not stated, it appears that the company as an English one, by which certificates of shares were issued, and in which the shares passed by transfer; the case was argued and decided on the footing of these shares being *choses in action*, and they are so described in the judgment of Lord *Hatherley*, then Lord Justice *Page Wood*. On the other hand, in the case of *Ex parte Union Bank of Manchester* (1871) (2), Vice-Chancellor *Bacon* held that shares in a company under 7 & 8 Vict. c. 110, were not *choses in action* within the meaning of the *Bankruptcy Act*, 1869, partly upon the ground that, if it had been intended to exclude from the operation of the law of reputed ownership everything incapable of manual delivery, a clearer term would have been used, and partly on the ground that the owner's title depended on the register. And again, in *Société Générale de Paris* v. *Tramways Union Company* (3), Lord Justice *Lindley* approved of the decision of the Vice-Chancellor, and dwelt upon the fact that a transferee of shares has a legal and not merely an equitable right to become a shareholder.

In this conflict of authorities upon the precise point, it is not useless to consider the authorities bearing on personal things of a kind closely analogous to shares in a company. The right of a fund-holder in the public funds, where there is, of course, a legal power to assign, has long ago (1790, 1817) been held to be a *chose in action*: *Dundas* v. *Dutens* (4); *Rex* v. *Capper* (5). In *Ex parte Ibbetson* (1878) (6) the Court of Appeal held a policy of assurance to be beyond all argument a thing in action within the meaning of the clause in question; and in *In re Bainbridge* (7) Chief Judge *Bacon* held that the share of a partner in the partnership property was a *chose in action*. If it be rightly decided, as I think it was, that a share in a partnership is a *chose in action*, it is very difficult to conclude that a share in a joint stock company is not

(1) Law Rep. 3 Ch. 555.
(2) Ibid. 12 Eq. 354.
(3) 14 Q. B. D. 424, 451.
(4) 1 Ves. 196.
(5) 5 Price, 217.
(6) 8 Ch. D. 519.
(7) 8 Ch. D. 218.

a *chose in action*. In the case of a partnership, the real and personal property of the partnership is, or may be, vested in all the partners, and each therefore may have a legal interest in *choses in possession*. In the case of a corporation, the whole property of the concern is vested in the corporation, and the individual corporators have no direct interest in the chattels in possession which may belong to the concern. In a partnership of seven persons, each would have a *chose in action;* if that partnership incorporated itself under the *Companies Act*, 1862, would each of the seven have a *chose in possession*?

Is there anything in the circumstances, or scope, or object, or context of the enactment in question, to shew that the words "things in action" are there used in a more restricted meaning than their ordinary legal significance? The words were first introduced into the bankruptcy law by the Act of 1869, the year following the decision of the Lords Justices in *Ex parte Agra Bank* (1), and I cannot think that when the same words were repeated by the Legislature in 1883 they can be taken to have used technical legal words in a non-natural sense, because a learned Judge of the first instance had placed on the Act of 1869 an interpretation which for the purpose of this argument must be considered to have been erroneous. So far as I can gather, the object of the Legislature both in 1869 and 1883 in excluding things in action from the operation of the law of reputed ownership was to confine its operation to two classes of things, namely, those outward and visible things of which there may be a visible occupation and enjoyment, and those debts which are part of the property of every ordinary trader; and thus to simplify the law by excluding those delicate questions (especially relating to notice) which arise in respect of *choses in action*, and of which *Ryall* v. *Rolle* (2) was one of the earliest, and *Ex parte Agra Bank* one of the then most recent illustrations. So far, therefore, as I can understand the object of the Legislature, it requires that the words shall receive their full legal import. I do not think that the assignability at law of the *chose in action* can have been a material consideration in the mind of the Legislature; for I see no relation between that circumstance and the law of reputed ownership; and it is very

(1) Law Rep. 3 Ch. 555. (2) 1 Atk. 182.

C. A. 1885 COLONIAL BANK v. WHINNEY. Fry, L.J.

noteworthy that whilst in 1869, when this exception was first introduced, debts were not legally assignable, they had become assignable at law before the Act of 1883. If in the Act of 1883 things in action had been confined to things in action not assignable at law, the book debts of the trader could not have been inserted as an exception, for they were assignable at law at that date.

It was further argued that the 50th section of the *Bankruptcy Act*, 1883 (corresponding with the 22nd section of the *Bankruptcy Act*, 1869), shews that a limited construction ought to be placed on the words "things in action." The 3rd sub-section vests in the trustee a power to transfer shares or other property transferable in the books of any company, and the 5th sub-section provides that things in action of the bankrupt shall be deemed to have been duly assigned to the trustee. But the enactments are, I conceive, cumulative and not mutually exclusive, for by sects. 20 and 54 of the Act all the property of the bankrupt is vested in the trustee. But even if in sub-sect. 5 of the 50th section the words "things in action" ought to be read as things in action other than those mentioned in sub-sect. 3, it appears to me that this furnishes no clue to the proper construction of sect. 44. And I may observe that in the definition of the word "property" I find nothing to shew that the words "things in action" are not used in their ordinary significance.

For these reasons I feel constrained to conclude that the shares in question are things in action, and that consequently they are not within the present law relative to reputed ownership. I have discussed what after all is a simple point, at a length which would be needless and pedantic were it not that I cannot differ from my brethren without hesitation and doubt, and that I wish to shew that I do not differ without an attempt fully to consider the question on which I so dissent from their conclusion. My opinion is, for the reasons I have given, that the appeal should be allowed, but that opinion is under the circumstances inoperative.

Solicitors for Plaintiffs: *Druce, Jackson, & Attlee.*
Solicitors for Defendant: *Lawrence, Plews, & Baker.*

H. C. J.

In re POWERS. LINDSELL *v.* PHILLIPS.

C. A. 1883 July 22.

[1885 P. 1885.]

Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 253]—*Bond by Sureties for Payment of Mortgage Debt—Rules of Supreme Court*, 1883, *Order* LV. *r.* 10—*Order for Administration at Suit of Creditor.*

In 1867 *T. P.* mortgaged an estate to *L. & A.* for £1000, and at the same time *E. P.* and *C. P.*, gave to *L. & A.* a joint and several bond in the penal sum of £400 reciting that the £1000 had been advanced at the request of *E. P.* and *C. P.*, and that they had agreed to give as a better security for part thereof a bond conditioned for payment of £200 and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. *T. P.* paid the interest till December, 1877, after which it fell into arrear, and in 1880 the mortgagees entered into possession. *E. P.* died in 1883 without having made any payment or given any acknowledgment. *L. & A.*, as creditors under the bond, took out a summons for administration of his estate. *E. P.*'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the *Real Property Limitation Act*, 1874. *Bacon*, V.C., without giving any opinion on this question, dismissed the summons under the discretion given by Order LV., rule 10, on the ground that a disputed debt ought not to be tried on summons:—

Held, by the Court of Appeal, that as there were no facts in dispute the Vice-Chancellor ought to have decided the question of law on the summons:—

Held, further, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the *Real Property Limitation Act*, 1874, s. 8:—

Held, further, that if remedy on the bond had been barrable by the lapse of twelve years under that section, the payments of interest by the mortgagor would have prevented the bar:—

Held, therefore, that *L. & A.* were entitled to rank as creditors against the estate of *E. P.*, and that if his representatives did not admit assets, an administration order must be made.

Sutton v. *Sutton* (1), *Fearnside* v. *Flint* (2), and *Cockrill* v. *Sparkes* (3) distinguished.

ON the 23rd of May, 1867, *Edmund Powers* and *Charles Powers* gave to *Lindsell & Archdale* a joint and several bond in the penal

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579. (3) 1 H. & C. 699.

C. A. 1885 *In re* POWERS. LINDSELL *v.* PHILLIPS.

sum of £400. It recited an indenture of the 23rd of May, 1867, to which neither of the obligors was a party, whereby freehold and copyhold estates belonging to *Thomas Powers* were respectively granted and covenanted to be surrendered to *Lindsell & Archdale* by way of mortgage to secure £1000 and interest. This deed contained a covenant by *T. Powers* with *Lindsell & Archdale* for payment to them of the £1000 with interest at 5 per cent. on the 23rd of November then next. The bond went on to recite that *Lindsell & Archdale* had advanced the £1000 at the request of the obligors, and that at the time of the agreement for the loan of the £1000 and interest, "and as a better security for part thereof, it was agreed that the said *E. Powers* and *C. Powers* should execute a bond in the penal sum of £400 conditioned for the repayment of the sum of £200 and interest, part of the said sum of £1000 and interest, at the rate of £5 per cent. secured by the said indenture of mortgage. Now, therefore, if the said *Thomas Powers*, his heirs, executors, or administrators shall pay to the said *R. H. Lindsell & F. Archdale*, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the said sum of £1000, together with interest for the same at the rate and on the days and in manner as by his covenant in the said indenture of mortgage of the 23rd day of May, 1867, is mentioned, then the above written bond shall be void," &c.

Down to December, 1877, an agent of *Thomas Powers* received the rents of part of the mortgaged property and paid the interest on the mortgage. From December, 1877, to December, 1879, the rents were insufficient to pay the interest, which fell into arrear, and in January, 1880, the mortgagees entered into possession of the whole of the mortgaged property.

Edmund Powers died in December, 1883, without having made any payment to the obligees, or given them any acknowledgment. *Charles Powers* had paid to the obligees £100 with interest.

On the 27th of March, 1885, the obligees took out a summons as creditors for the administration of the estate of *Edmund Powers*. The Chief Clerk of Vice-Chancellor *Bacon*, on the 14th of May, made an order dismissing the summons. The obligees moved before Vice-Chancellor *Bacon* that this order might be discharged and an order for administration made. The representatives of

Edmund Powers contended that the remedy on the bond was barred by the *Real Property Limitation Act*. The Vice-Chancellor said that as the Court under the new practice, Order LV., rule 10, had a discretion as to whether it would grant an administration order, he should affirm the decision of the Chief Clerk, and leave the Plaintiffs to their remedy at law. The Plaintiffs appealed, and the appeal came on in the interlocutory list. After the argument had proceeded for some time, *Cotton*, L.J., observed that this was a final appeal and ought to have been in the general list, but as it had been opened, the Court determined to proceed with it.

Warrington, for the Appellants :—

The refusal of the Vice-Chancellor to give any relief is opposed to the *Judicature Act*, 1873, s. 24, sub-s. 7, and will multiply actions, for if it be upheld we must commence a second proceeding.

[*Upjohn*, for the Defendants :—The Vice-Chancellor considered that it was a case of a disputed debt, and that the estate ought not to be put to the expense of a general administration.]

I admit that an order for administration ought not to be made till the debt is established, but the proper course would be to decide at once on the validity of the debt, or put the matter in a course of trial. In this case there are no disputed facts, and the point can be decided at once. Then as to the debt : the bond as a bond is not barred, for it is not twenty years old ; if it is barred at all it must be on the ground that it is a security for money charged on land. It was decided in *Sutton* v. *Sutton* (1) that the limitation of twelve years, imposed by the *Real Property Limitation Act*, 1874, s. 8, on actions and suits for the recovery of money charged on land, applies to the personal covenant in a mortgage deed as well as to the remedy against the land, and in *Fearnside* v. *Flint* (2) it was held that the same rule applied to a collateral bond. But those cases only decide that the remedy in the covenant or bond is barred when the remedy against the land is barred, and in the present case the remedy against the land is not barred. I submit, moreover, that the enactment does not

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579.

C. A. 1885 *In re* POWERS. LINDSELL *v.* PHILLIPS.

apply to a bond by a third party, who does not engage to pay out of land or bind the land, but covenants by way of suretyship that the mortgagor shall pay.

Upjohn, contrà :—

The Vice-Chancellor went on this, that there being a dispute as to the debt, and no allegation that the estate was insolvent, a general administration ought not to be ordered, and I submit that his decision ought to be upheld. Then as to the merits, there is no provable debt. The debt is a sum of money payable out of land, and there has been no payment or acknowledgment by *Edmund Powers* for more than twelve years.

[BOWEN, L.J. :—This is not an action to recover money charged on land, but to enforce an indemnity against the consequence of some one else not paying out of land.]

Payments have been made by *Thomas Powers* which have kept the debt alive as against him, but a payment by one co-debtor will not, since the recent statutes, prevent the *Statute of Limitations* from running against the others: *Whitcomb* v. *Whiting* (1).

[COTTON, L.J. :—Is there any authority shewing that a surety may be protected by the statute, though the principal debtor has gone on making payments.]

Yes. *Cockrill* v. *Sparkes* (2).

[COTTON, L.J. :—That was a case of a joint and several note by two persons, one of whom was in fact only a surety. Here on the face of it the bond is only given by sureties.]

The Court there went on the general ground that there was a payment by one of two co-debtors, and that, by reason of the *Mercantile Law Amendment Act*, 1856, payment by one did not take the case out of the statute as against the others.

COTTON, L.J. :—

It is contended that this bond is barred by the *Real Property Limitation Act*, 1874, s. 8. As a merely personal bond it clearly is not barred, for it is not twenty years old, but it is urged

(1) 1 Sm. L. C. 8th Ed. pp. 642, 644. (2) 1 H. & C. 699.

that it is barred by the enactment that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same," unless there has been such part payment or acknowledgment as therein mentioned. The first question is, whether the bond in the present case comes within the scope of that enactment. It is true that the bond is said upon its face to be given to secure the payment of £200, part of a sum of £1000, which £1000 is secured by mortgage of real estate, and in some sense it may be said that the £200 for which the bond is given is part of the sum secured by the mortgage. But in fact the one debt is not a part of the other, they are different debts, one is the debt of *Thomas Powers*, the other is the debt of the two sureties. The case is quite different from *Sutton* v. *Sutton* (1), where it was sought to sue the mortgagor on the covenant in his mortgage deed, when the remedy against the land was barred by the statute. The debt there was one and the same debt, and we held that the words of the section must have full effect given to them, and that the debt could not be recovered from the mortgagor personally, any more than out of the land. Lord Justice *Fry* extended this rule to the case where the bond was a separate instrument. Those cases appear to me to have no application to a case where a bond is given by another person conditioned to be void if the mortgagor pays the mortgage debt, and where the mortgage is still alive. If the remedy on the bond taken by itself was barred, I am of opinion that no payment by the mortgagor would keep it alive, but where a bond which by itself is not barred, is given for the purpose of guaranteeing the payment by the mortgagor of the mortgage debt, and the mortgagor makes payments which prevent the remedy on the mortgage from being barred, I am of opinion that the remedy on the bond is not barred. The decision in *Cockrill* v. *Sparkes* (2) is not inconsistent with this. There were in that case two makers of a joint and several promissory note, and it was decided that

(1) 22 Ch. D. 511. (2) 1 H. & C. 699.

C. A. 1885 *In re* POWERS. LINDSELL *v.* PHILLIPS. Cotton, L.J.

under the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 14, a part payment by one did not take the case out of the *Statute of Limitations* as against the other. I do not think that this applies where a separate bond is given by sureties to guarantee the payment of a mortgage debt, and the mortgagor makes payments. There will be a declaration that the claim of the Plaintiffs is not barred, and unless the Defendants admit assets, the usual order for administration must be made.

As regards the view taken by the Vice-Chancellor, it is true that it is not a right course to take out an administration summons to obtain payment of a disputed debt, where the dispute turns on matters of fact, but when the question depends merely on a point of law it ought to be decided without putting the parties to another proceeding.

LINDLEY, L.J.:—

I think the Vice-Chancellor can hardly have understood that in this case there are no facts in dispute. A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact, but where there is no dispute of fact the validity of the debt can be decided just as well on a summons as in an action. I think, therefore, that the Vice-Chancellor took an erroneous view when he declined to entertain the application.

The question on the merits is whether the Plaintiffs are creditors. The bond is not twenty years old, which *primâ facie* shews that they are. But it is said that the money secured by the bond is part of a sum secured by mortgage, and that therefore the remedy for it is barred by the lapse of twelve years. Is that so? This is not a case where a bond is given for a debt secured on land, and though the bond speaks of the £200 as part of a sum of money secured on land, we must not allow ourselves to be misled by that expression. The mortgage was given by *Thomas Powers*, the bond by other persons, and it is difficult to say that the bond is for the same debt. We are asked to say that the money secured by the bond is money charged on land, but I cannot say so. I agree that the surety on paying the debt would be entitled to the benefit of the mortgage, but that does not make the money secured by the bond a charge on land at the present time.

But suppose the twelve years limitation to apply to the bond, can the remedy under it be considered as barred while the mortgage is yet alive. To decide that let us look at the condition of the bond, which is that if *Thomas Powers*, his heirs, executors, or administrators, shall pay the mortgage money and interest the bond shall be void. The mortgage money and interest have not been paid or satisfied, and the mortgagor is still liable to pay them, so the bond remains in force.

If the Defendants therefore admit assets there will be an order for payment, and if they do not, an order for administration.

BOWEN, L.J. :—

I think the Vice-Chancellor must have been under the impression that there was some dispute as to facts, or some other complication in this case, otherwise he would hardly have dealt with it as he has done.

The point of law on which the Respondents fail is whether this case is not within the *Real Property Limitation Act*, 1874, s. 8. Is this an action brought to recover a sum of money charged on or payable out of land? In a mortgage deed the money is secured on land, and is also either a specialty or a simple contract debt of the mortgagor. An action against the mortgagor for the debt is an action to recover money which is charged on land. But an action on a bond given by another person to guarantee payment of that debt is not a proceeding against the same person, nor to recover the same sum, it is an action to recover damages from a third person, because the mortgagor does not pay. In *Sutton* v. *Sutton* (1) we thought that an action by the mortgagee against the mortgagor to recover the mortgage debt was none the less an action to recover money charged on land, because it was an action on covenant, and not a proceeding against the land. And Lord Justice *Fry*, in *Fearnside* v. *Flint* (2), extended the rule to a collateral bond given by the mortgagor, in which I think he was right, for to hold otherwise would be to give an instrument a different effect on account of its not being on the same sheet of paper. In the present case the proceeding is not between the same parties, nor to recover the same sum, as if an action had

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579.

C. A. 1885 *In re* POWERS. LINDSELL *v.* PHILLIPS.

been brought on the mortgagor's covenant, it is a proceeding to recover an indemnity against the non-payment by another person of a sum of money which he had charged on land. If the bond could be brought within the 8th section I think it must be held that the part payments by the mortgagor would prevent that clause from barring the remedy.

Solicitors for Plaintiffs: *Stibbard, Gibson, & Co.*
Solicitors for Defendants: *Ullithorne & Co.*

H. C. J.

C. A. 1885 NORTH, J. *July* 1, 2. C. A. *July* 23, 25.

CROMPTON *v.* JARRATT.

[1884 C. 4902.]

Advowson—Freehold Hereditament "situate in the parish of D."—Description —Parcels—General Words—Recitals.

An advowson, although it is a hereditament, and as being the right of presentation to a church at a particular place, "does concern land at a certain place," is but a right collateral to land, and is not aptly described as "being situate at" a particular place.

Such a description, however, may pass an advowson under certain circumstances, *e.g.* when upon an examination of the whole instrument a clear intention is shewn that it shall pass, or upon evidence that there is no other property in that particular place capable of being disposed of by the instrument.

Anon. (1) and *Kensey* v. *Langham* (2) discussed and reconciled.

General words, although introduced for the purpose of sweeping into the assurance everything which has been omitted by mistake, apply *primâ facie* only to things *ejusdem generis* with those specifically enumerated.

G. J., tenant in tail in possession of manors, lands and hereditaments, devised by the will of *J. J.*, and also of the advowson of *Christ Church, Doncaster*, appointed to somewhat similar uses by a separate devise in the same will, by a deed which recited only the devise of the manors, &c., disentailed and limited to the use of himself in fee, "All and singular the manors, lands, hereditaments and premises devised by the said will, and also all other the lands, hereditaments and premises whatsoever, of which he was seised as tenant in tail in possession in anywise howsoever."

By a deed of resettlement executed the next day, after reciting that he was seised of "The several manors and hereditaments comprised in the

---

(1) 3 Dyer, 323 b.
(2) Cas. t. Tal. 143, called also *Kensey* v. *Langhorn*, *Kensey* v. *Langman*.

schedule subject to certain charges," and desired to settle "the same hereditaments" he assured to trustees in strict settlement, "All and singular the manors, messuages, farms, lands and hereditaments comprised and described in the schedule," "and all other the freehold hereditaments of him the said *G. J.* situate in the parish of *Doncaster*." The schedule contained a detailed description of the parcels, but neither in it nor the deed itself was there any reference to, or any provision applicable to the advowson. *G. J.* had property other than the advowson in the parish of *D.*, and the advowson was not subject to any charges.

It was admitted that some portions of the disentailed property had been intentionally omitted from the resettlement:—

Held, by *North*, J., that the advowson was included in the disentailing deed.

Held, by the Court of Appeal (affirming the decision of *North*, J.), that having regard to the recitals, the omission of parts of the property, and looking to the whole scope of the deed, the advowson was not by force of the general words "all other hereditaments situate in the parish of *D.*" included in the deed of resettlement.

JOHN JARRATT, being the owner of a considerable property at *Doncaster*, procured the passing of a private Act of Parliament, entitled "An Act for erecting a Church in the Parish of *Doncaster* in the West Riding in the County of *York*." This Act, which obtained the Royal assent on the 23rd of June, 1827, after providing for the erection and endowment of the said church, enacted by sect. 9 that the advowson or right of patronage, nomination or presentation thereto should for ever thereafter be vested in and belong unto such person or persons, for such estates or interests, either in fee simple or for any lesser estate, as the said *J. Jarratt* should by any deed to be thereafter duly executed by him, or should have already or should thereafter by his last will and testament direct, limit or appoint, and in default of such direction, limitation or appointment, or subject thereto, unto the said *J. Jarratt* for life, and afterwards as therein mentioned.

The Act did not purport to annex the advowson or make it appendant to any of the manors belonging to the said *J. Jarratt*. The church shortly after the passing of the Act was consecrated and called *Christ Church*.

J. Jarratt, by his will, dated the 9th of June, 1827, in exercise of the power intended to be vested in him by the Act appointed and devised that "All that the advowson or right of presentation and nomination to the perpetual curacy of the said then intended

C. A. 1885 CROMPTON v. JARRATT.

church should go to the use of trustees during the life of his niece *Frances Bulmer*, and until *G. Jarratt Horsfall*, if he should so long live, should attain thirty, and after the determination of the estate so limited to the trustees, to the use of the said *G. J. Horsfall* for his life, and after his death, to the use of his first and every other son in tail male, with remainders over as therein mentioned." And the testator declared that the limitations of the advowson to the trustees were made upon trust to nominate some fit person with a discretionary power to nominate the said *G. J. Horsfall* if in holy orders, to the church when it was consecrated. Under an earlier and distinct devise contained in the same will, all the testator's lands, manors, tenements and real estate were settled upon somewhat similar limitations under which, at the date of the disentailing deed hereinafter mentioned, *G. J. Jarratt* was tenant in tail in possession thereof.

The testator died on the 15th of January, 1828, and his will was proved on the 16th of April, 1828. His niece had predeceased him. The said *G. J. Horsfall* attained thirty, took the name of *Jarratt* and died on the 9th of May, 1856, leaving *G. J. Jarratt*, who attained twenty-one on the 16th of April, 1857, his eldest son, tenant in tail in possession, as well of the advowson as of the devised real estate.

On the 17th of April, 1857, the said *G. J. Jarratt* executed a disentailing assurance, and which was duly enrolled, by which, after reciting the will of the said *J. Jarratt*, so far as it contained the said distinct devise of his lands, tenements and real estate (but not the appointment of the advowson) and the compulsory purchase of certain parts of the estate, and the limitation of the personal estate by way of heirlooms, and his desire to bar the entail in the hereditaments, books, pictures, &c., comprised in or subject to the provisions of the will, he barred the entail in "All and singular the manors, messuages, farms, lands, hereditaments and premises comprised in and devised by the said recited will of the said *J. Jarratt*, and also all the lands, hereditaments and premises which by purchase or otherwise had become settled or subject to the uses by the same will declared of the said hereditaments thereby devised as herein aforesaid, and also all other the lands, hereditaments and premises whatsoever, which

the said *G. J. Jarratt* is seised of or entitled to as tenant in tail in possession in anywise howsoever, with the appurtenances."

On the 18th of April, 1857, the said *G. J. Jarratt* executed a resettlement by deed between himself of the one part, and the Defendants *William Aldam* and *Stafford Baxter Somerville* of the other part, whereby after reciting that he was seised of and entitled to the several manors and hereditaments comprised and described in the schedule thereunder written, for an estate in fee simple, subject to certain charges limited under powers contained in the will, and reciting his desire of settling the same hereditaments to the uses and in the manner thereinafter contained, he granted to the said Defendants their heirs and assigns "All and singular the manors, messuages, farms, lands, hereditaments and premises comprised and described in the schedule thereunder written, and all other the freehold hereditaments of him the said *G. J. Jarratt*, situate in the several parishes of *Doncaster*, *Warmworth* and *Cantley*, in the county of *York*, with the appurtenances, To hold the same unto the said Defendants their heirs and assigns, to the use of the settlor for life, with remainder to his first and other sons in tail male, with remainder to the use of the Defendant *J. Jarratt* for life, with remainder to the use of his first and other sons in tail male, with remainder to the first and other daughters of the settlor in tail male, with remainder to the first and other daughters of the said *J. Jarratt* in tail male." The deed contained none of the provisions usually inserted in the settlement of an advowson. The schedule to the deed comprised numerous particulars (including several manors described without any acreage), but contained no mention of any advowson. It was admitted that the heirlooms and certain lands included in the disentailing assurance, and not in any of the three parishes mentioned, were omitted in the deed of resettlement, and that the advowson was not subject to any charges, the powers of the will not extending to the advowson. This settlement although originally voluntary had by subsequent acts become one for valuable consideration, prior to the date of the mortgage of the 9th of May, 1876, mentioned below.

Doubts having been raised whether the advowson had been

C. A. 1885 CROMPTON v. JARRATT.

effectually disentailed, *G. J. Jarratt* executed and duly enrolled another deed of the 4th of May, 1868, whereby he purported expressly to disentail the advowson.

By deed of the 9th of May, 1876, *G. J. Jarratt* mortgaged the advowson and other property to the Plaintiff, the Rev. *B. Crompton* for securing payment of £6573 and interest. The deed contained a power of sale which had become exercisable, and by two subsequent deeds the same property was further charged in the Plaintiff's favour.

G. J. Jarratt by his will devised the advowson to the Plaintiff, and gave all other his real and personal estate to the Plaintiff upon certain trusts, and appointed him sole executor, and he duly proved the will.

G. J. Jarratt died in February, 1884, without issue, and his brother *J. Jarratt* became entitled as tenant for life of the hereditaments included in the resettlement. He had issue, one child only, viz. a daughter, the Defendant *Ellen Charlotte Jarratt.*

The living had become vacant, and the Defendant, *J. Jarratt,* claimed a right as tenant for life under the resettlement to present his nominee for institution to the living and threatened to do so.

The Plaintiff accordingly instituted the present action against *J. Jarratt,* his daughter—the trustees of the resettlement and one other—claiming (*inter alia*) a declaration that the advowson was not comprised in the resettlement, and that, subject to the agreement for sale and the mortgage securities, it was now vested absolutely in the Plaintiff—an injunction to restrain *J. Jarratt* from presenting any clerk not nominated by the Plaintiff.

The action came on for hearing before Mr. Justice *North* on the 1st of July, 1885.

Barber, Q.C., and *S. Hall,* for the Plaintiff:—

The advowson was not included in the disentailing deed or in the settlement. The recitals control the operative part of the deed, and the words must not be extended beyond their ordinary sense: *Broom's* Legal Maxims (1); *Gray* v. *Earl of Limerick* (2);

(1) 4th Ed. p. 623. (2) 2 De G. & Sm. 370.

Doe v. *Meyrick* (1); *Rooke* v. *Lord Kensington* (2); *Danby* v. *Coutts & Co.* (3).

Everitt, Q.C., and *Wolstenholme*, for the principal Defendants:—

The words clearly include the advowson unless something is found to cut them down, and there is not enough to have that effect. The Plaintiff tried to get rid of these deeds in *Jarratt* v. *Oldham* (4), and now tries to evade their effect in this way. It is clear that the scheme was to include everything. It is doubtful if the reasoning in *Kensey* v. *Langham* (5) is right. An advowson will pass by the word "hereditament": *Com.* Dig. Advowson (6); *Anon.* (7); which is recognised in *Earl of Albemarle* v. *Rogers* (8); *Bishop of London* v. *Chapter of Southwell* (9). In *Gray* v. *Earl of Limerick* (10) there was no question as to the legal estate.

Simmonds, and *R. Roberts*, for other Defendants.

NORTH, J., after stating the facts and holding that the disentailing deed included the advowson, continued:—

Certain cases were cited by Mr. *Everitt* as authorities to shew that the word "hereditaments" was sufficient to pass an advowson; for that he cited an anonymous case in *Dyer* (7) and the case of *Bishop of London* v. *Chapter of Southwell*. That case I think clear. I do not think there is any doubt that the words there are quite large enough to pass an advowson. But then Mr. *Everitt* contends that inasmuch as we have here words which would pass the advowson, it must pass unless something be found in the deed to prevent its passing. That seems to me to be begging the question. I cannot begin by assuming that the advowson passed with those parcels unless there is something found to cut them down. I must look at the whole deed and come to a conclusion

(1) 2 C. & J. 223, 230.
(2) 2 K. & J. 753.
(3) 29 Ch. D. 500.
(4) 39 L. J. (Ch.) 349.
(5) Cas. t. Tal. 143.
(6) C. 1.
(7) 3 Dyer, 323 b.
(8) 2 Ves. 477.
(9) Hob. 303.
(10) 2 De G. & Sm. 370.

C. A. 1885 CROMPTON v. JARRATT. North, J.

from it whether the intention of the word "hereditament," as there used is to pass the advowson or not. If it is the intention, the words are no doubt large enough; but the question is as to the intention.

First of all, we have the recitals referring to the property and referring to desire, expressly framed in such terms as not to include the advowson, and we have, in the witnessing part which leads up to the parcels, a statement that the desire which was to be carried out was the desire which is mentioned in the recital, which clearly does not include the advowson. Then we have this further, that the property is "All the freehold hereditaments situate in the several parishes of *Doncaster*, &c.," and a case of *Kensey* v. *Langham* (1) was cited, in which certain observations were made by the Lord Chancellor rather bearing on that point. There the words of the devise as stated in the report were, his manor of *Faxton*, and other lands mentioned in the will, "And all other his messuages, cottages, closes, woodlands, and tenements whatsoever in *Faxton*, *Haslebitch*, *Subby*, and *Hardwicke* in *Northamptonshire*, and all other his lands and tenements not thereinafter devised." It appears, from a note to the third edition, that the words of the devise as stated in the Registrar's book, were "messuages, lands, tenements and hereditaments." But I do not think that those were the words which the Lord Chancellor was deciding, because not only does it not appear in the report, but further, the result of his decision was that a case was sent for the opinion of the Judges of the King's Bench whether the word "tenements" in the will would pass the inheritance of the advowson to the trustees, and the Judges afterwards certified that the advowson did not pass by the devise in question, as appears from a manuscript note of the late Mr. *Cox* of *Lincoln's Inn*, in a copy in the library of that society. Therefore, I take it that whatever were the actual words used in that will, the case proceeded upon the words "messuages and tenements" only. Nothing really turns upon that excepting as a foundation for the suggestion that the case was not a very reliable one; but the Lord Chancellor made these observations at the beginning of his judgment: "The

(1) Cas. t. Tal. 143.

question (1) is whether the advowson passed to the trustees by the will? And I rather incline to think, that by the first words it does not pass, there being lands lying and being at *Hardwicke* to satisfy these words; and an advowson being but a right of presenting, cannot be said to be situate." It was said that that case is open to doubt, having regard to the earlier decision in the *Anonymous Case* (2), but on referring to that case, I do not find anything which throws doubt on the later case. There are certain remarks as to what is meant by "hereditaments situate, lying, and being in *T.*," where the advowson in question in that case was, and then it is said it was "holden by the Court that it passed, for it hath some being in the town," not that it is situate, but that "it hath some being in the town and Church of the vicarage, because the view in a writ of right of advowson shall be given in the Church, &c., although it does not lie in livery nor is visible nor palpable." That case really does not seem to me to throw any doubt upon the other, though the other does not help me very much, inasmuch as it is really only an indication of what the Lord Chancellor inclined to think. The result is, that the description or reference here to other freehold hereditaments in the parishes does not help me, though I must say it does not seem a very apt description of the advowson, and if the advowson had been intended to pass, I think that some other word than "situate" would probably have been used, although I quite admit if the words had been "All that advowson situate in the parish of *Doncaster*," no one could have taken exception to the words, or have doubted that it was a sufficient description. The word "situate," therefore, does not help me much, although it is fairly to be remarked upon by the counsel for the Plaintiff.

Then considering what construction is to be put upon this deed, certain authorities were cited, which I refer to so far as they shew the principle upon which such cases are to be decided. Of course the exact words used there, if different from the words used here, prevent any such case from being a decision *in rem*,

(1) Upon reference to the Registrar's book during the argument in the Court of Appeal, it appeared that the question which was sent to the Court of King's Bench was, whether the advowson passed by the will, and not by any particular devise in the will.

(2) 3 Dyer, 323 b.

C. A. 1885 CROMPTON v. JARRATT. North, J.

if I may use that phrase. The first case cited was *Moore* v. *Magrath* (1). [His Lordship then stated the facts in that case:] Two questions seem to have been argued and discussed before the Court, and were dealt with in the judgment delivered by Lord *Mansfield*, three other Judges concurring with him. The two questions were these: First, whether, upon the construction of the deed, the donor has settled his paternal estate; and, secondly, whether he has declared any use of it. He says: "If he has not, it must result to himself: for the declaration being that the estate should be to such uses as were declared, and no other, unless he has declared some use, there is no disposal of it: and in order to disinherit an heir-at-law, a man must give his estate to somebody else. With respect to the first point, it strikes me very strongly, that being seised of a paternal estate, and an estate in right of his wife, it was reasonable he should not settle both; and I believe there was some private motive for his settling the one in preference to the other; but not seeing the deed, we are at a loss. I am of opinion that he never had an idea of conveying any part of these lands by the deed of 1742, though, by the blunder of the drawer, he may have used words that might extend to them. The deed begins with the preamble usual in all settlements; that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an Act of Parliament, is the key to what comes afterwards. Now the preamble does not mention a word of his paternal estate: whereas, if it had been his intention to settle that, would he not have added after the word 'moieties,' words to the effect following, 'and also all other his lands, &c., in the Kingdom of *Ireland*'? It is scarcely possible, if he had an idea of including his paternal estate in the settlement, that he should recite his intention of settling the one, and be totally silent as to the other. Again the deed goes on, with much tautology, to describe every part of each of the undivided moieties, most minutely and particularly. Would he do that with an intention of passing his paternal estate by the same deed, and make no description of it at all? It is very common to put in a sweeping clause; and the use and object of it in general is, to guard against any accidental omission: but in such

(1) 1 Cowp. 9, 12.

cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned. I am therefore of opinion from the words of the preamble, that the donor did not intend to include his paternal estate: and it is more than probable that the drawer by mistake omitted inserting the two counties before the words 'in the Kingdom of *Ireland*.' The second question is 'whether any use is declared of the sweeping clause'? Now though he has minutely described the uses of the undivided moieties, he certainly has not declared any one use or limitation of the sweeping clause. This circumstance alone is a strong argument in favour of the construction which the Court inclines to upon the first point. But nothing can be so clear as that this estate must result to the heir, since no use is declared of it."

It was said with reference to that case that the second ground of decision is perfectly clear, and that that reduces the first ground to a *dictum*. I cannot act on any such view as that. There were two points argued, and solemnly decided, and I cannot say that the first point is a good point and the second is a *dictum* any more than I can say that the second point is clear and the first is a *dictum*. I cannot act on any such view. It was a formal decision of the Court upon two points, although the Court might have thought that deciding one was enough without deciding the other.

That throws light upon the present case in two or more ways. In that case there was no use declared of the estate other than of the moieties. In the present case, as I understand, there is not a word in the resettlement from beginning to end in any way referring to the advowson, and I should have expected it to be mentioned if it was intended to be the subject of the resettlement. From that case I get in addition the leading principle laid down, that the recitals are the key to what is intended to be done by the deed, and that though general words may be put in to guard against an accidental omission, yet in the absence of any indication of a larger meaning, the deed must be held to refer to estates or things of the same nature or description with those which have been already mentioned. Here if the advowson had been intended to pass I cannot imagine any reason why it

C. A. 1885 CROMPTON v. JARRATT. North, J.

should not have been referred to. It would have been very easy to mention it; I should have expected to find words in some part of the deed referring to it in some way, and I should have expected also to find the recitals, which are so very precise and particular, expanded in some way so as to refer to the advowson, which at the time was a thing of considerable value. It has been offered for sale recently at £3000; and though it might have been worth somewhat less thirty years ago, still it was a thing of considerable value at that time, and yet there is no reference to it of any sort or kind whatever.

Then there is this further, that an advowson is in its nature unlike the property which is referred to in the recitals in the deed and in the schedule. No doubt in this deed the parcels are put very shortly and not at full length, as they were in *Moore* v. *Magrath* (1); yet there is a reference to the schedule in which they are fully described in every detail. Another case referred to as a clear authority is *Rooke* v. *Lord Kensington* (2), a well-known decision of Lord *Hatherley's*. There he goes somewhat fully into the construction of the deed. There was there, as here, a clear description, and what the Vice-Chancellor proceeded upon in his judgment was the clear intention shewn by the reference in the recitals and the difference in the nature of the property which was contained in the particular parcels, and what would have been contained in them if the general words had the construction which it was contended should be placed upon them. He referred to *Moore* v. *Magrath*, and adopted the view taken there, that the general description was to sweep everything *ejusdem generis* into the mass of the property which was before described by the map and by the perfect description.

I ought not to pass from that case without mentioning that the words there were: "All other the lands, tenements, and hereditaments (if any), in the county of *Middlesex*," and those words "if any" are not found in the present case. That is a circumstance no doubt deserving of consideration, and has been pressed upon me. If the words "if any" had been found in the present case I could not distinguish, and I cannot say that the omission of the words "if any" in the present case enables me

(1) 1 Cowp. 9. (2) 2 K. & J. 753.

to distinguish, that case from this, or to say, that that makes the difference between the construction of the deeds in the two cases.

Another case referred to was *Jenner* v. *Jenner* (1), in which the Vice-Chancellor *Wood* refers to his previous decision and to *Moore* v. *Magrath* (2) with approval, and he came to the same conclusion as he had done before. In that case also the words "if any" were found in the deed; but the remarks I have just made upon that point will apply to this case also, and I have no further remarks to make upon it. In addition to that there was this fact, that the property specifically mentioned was limited to such uses as the settlor should appoint, and subject thereto to him in fee, and the property said to be comprised in the general words belonged to him in fee. The conveyance was a conveyance in bulk in one witnessing part, and there the words used are "appoint" as well as "grant," and the Vice-Chancellor makes the remark: "It is not an appropriate form of conveyance to convey an estate in fee simple by way of appointment, as would be the case if it formed part of the property which was released by the marriage settlement." That is a matter which is the subject of remark, but I do not think it is very important, and I do not think he can have relied upon it very much, because it is very common where there are two properties over one of which a power of appointment exists, and over the other of which a power to convey only exists, to put the two together. Then the proper construction of that witnessing part is to read the appointment with reference to the property over which there is a power of appointment, and to make the grant of the whole property, including that over which there is a power (if there is a power) to convey, to apply to that, as well as to the other. A passage was quoted from a decision of Sir *George Jessel* in the case of *Howard* v. *Earl of Shrewsbury* (3). "Nothing, I consider, is better settled than that these general words, even where they would pass the land *ex vi terminorum*, are restricted by the recitals and what is called the scope of the instrument. This is illustrated by the case of *Hopkinson* v. *Lusk* (4) before Lord *Romilly*. The principle is, that though words of specific description are not easily dealt with, yet general words are; and

(1) Law Rep. 1 Eq. 361, 368.
(2) 1 Cowp. 9.
(3) Law Rep. 17 Eq. 378, 391.
(4) 34 Beav. 215.

C. A. 1885 CROMPTON v. JARRATT. North, J.

that, though general words may be in themselves large enough (which I do not think these are, because there is no evidence to comprise the property in dispute), yet if, upon the whole scope of the instrument, as to which especial regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass those properties, it will not pass them." That is a statement of principle again. You must consider the intention as ascertained from the document itself, and there is especial regard to be had, as he says, to the introductory recitals.

Looking then at all those circumstances, looking at the nature of the case, looking at the fact that there is no reason why the advowson should not have been mentioned if it was intended to pass, looking also to this, that the recitals do not in terms in any way include the advowson, and there is no reason why they should not have done so if the deed had intended to operate upon the advowson, looking at all those circumstances and giving such weight as may be due to the description—the property being situate in *Doncaster*—looking at all those things together, the conclusion I come to is that it was not the intention of the parties that the advowson should pass by this deed, and that the intention of the parties as shewn by the deed was to pass the properties specifically referred to in the schedule, with such incidentals as in the cases I have cited the larger words of description would include in the ordinary way, but it was not intended to include and does not include such a totally different thing as an advowson, with reference to which there was no reason to omit it if it was intended to pass.

C. M.

C. A. From this decision, so far as related to the resettlement, the two first-named Defendants appealed, and by leave of the Court of Appeal the hearing of the appeal was advanced, and came on on the 23rd of July.

Everitt, Q.C., and *Wolstenholme*, for the Appellants:—

The advowson passed by the words "hereditaments situate in *Doncaster*."

It cannot be disputed that an advowson is a hereditament and

would pass under such a description. Although an incorporeal hereditament it partakes of the nature of land in the same way as tithes, for which, although only produced out of land, an action of ejectment could be brought, and in the old style of pleading an advowson would be properly called "terra" (1). Therefore it is not an inexact expression to speak of an advowson as an hereditament situate at a certain place, and, in fact, it is covered by the authority of *Anon.* (2), where the advowson of the vicarage of *T.* was held to pass in a lease of "all hereditaments situate in *T.*," the reason given for that decision being that "an advowson has some being in the town and church of the vicarage, because the view in a writ of right of advowson shall be given in the church." That case has been cited and quoted as an authority in *Bishop of London* v. *Chapter of Southwell* (3), *Earl of Albemarle* v. *Rogers* (4), and *Viner's* Abridgment. The *dictum* of the Lord Chancellor in *Kensey* v. *Langham* (5), to the effect that an advowson cannot be said to be situate, is no doubt at variance, but the case in *Dyer* does not seem to have been cited, and the decision does not seem to be very clear and cannot be treated as overruling so distinct a decision as *Dyer's* case.

The whole object of general words such as these is to sweep in anything which may have been accidentally omitted, and therefore, although no intention may be found in the deed to include any particular item, such intention must be implied, and the recitals must not be looked at too strictly: *Moore* v. *Magrath* (6); *Rooke* v. *Lord Kensington* (7); *Jenner* v. *Jenner* (8).

Barber, Q.C., and *S. Hall*, for the Respondent:—

This is an advowson in gross and not annexed or made appendant to any manor belonging to the settlor. There is also the fact that admittedly some of the property which had been

(1) The old essoin for an advowson was *de placito terræ*. See *Bishop of London* v. *Chapter of Southwell* (Hob. 303). Essoin is described as an allegation of an excuse for him that is summoned or sought for to appear and answer to an action real . . . upon just cause of absence: *vide Cunningham's* Law Dictionary, Ed. 1641.

(2) 3 Dyer, 323 b.

(3) Hob. 303.

(4) 2 Ves. 477.

(5) Cas. t. Tal. 143.

(6) 1 Cowp. 9.

(7) 2 K. & J. 753.

(8) Law Rep. 1 Eq. 361.

C. A. 1885 CROMPTON v. JARRATT.

disentailed is excluded from the resettlement, and therefore there is no necessary presumption of the intention to settle the advowson, and the Court must ascertain whether it has been settled by examining the whole deed. There is no reference to it throughout, nor are there any of the provisions, *e.g.*, power to present during minority, which would be usually inserted in a well-drawn settlement as this is. If the advowson is to pass, the only thing which can be relied on as shewing an intention of passing it, are the words of general description superadded to the parcels in the deed. But general words are only intended "to refer to estates or things of the same nature and description with those that have been already mentioned:" see per Lord *Mansfield*, in *Moore* v. *Magrath* (1); and the advowson is not *ejusdem generis* with what was mentioned.

An advowson may be a hereditament, but it cannot be a "hereditament situate in a parish," and on that the decision of Lord *Talbot* is conclusive, and the decision in *Dyer* must be treated as overruled or as depending on some evidence which we have not got. In this case the advowson is a mere right of presentation. The introductory recitals are important, for what the settlor intends to settle are certain parcels which are subject to a rentcharge, and the advowson is not subject. The generality of words of conveyance are cut down by the recitals, and if there can be any doubt, a reference to these makes it clear: *Walsh* v. *Trevanion* (2); *Howard* v. *Earl of Shrewsbury* (3); *Gwyn* v. *Neath Canal Navigation Company* (4); *Bailey* v. *Lloyd* (5).

Everitt, in reply.

July 25. COTTON, L.J.:—

This is an appeal by some of the Defendants from a decision of Mr. Justice *North*, who decided against them that a deed of resettlement executed by *George J. Jarratt*, on the 18th of April, 1857, did not pass or include an advowson to which at the date of the resettlement he was absolutely entitled.

(1) 1 Cowp. 9.
(2) 15 Q. B. 733.
(3) Law Rep. 17 Eq. 378.
(4) Ibid. 3 Ex. 209.
(5) 5 Russ. 330.

The facts of the case are very short, and the whole question really turns on the construction to be put upon the parcels in the deed of resettlement. [His Lordship stated the facts as set out above and continued:—] In substance at the time when *G. J. Jarratt* became tenant in tail in possession, the limitations of the advowson and of the rest of the estate were the same.

On the 17th of April, 1857, *G. J. Jarratt* executed a disentailing deed, and it has been held—and there has been no appeal against that part of the judgment—that that deed did effectually bar the entail in the advowson as well as in the rest of the settled property. Then on the following day he executed the deed of resettlement on which this question arises. The parcels of that deed are set out in a schedule to it, which schedule contains certain manors and a number of parcels which are specifically mentioned. By the deed he conveys all and singular the manors, messuages, lands, hereditaments, and premises comprised in the schedule—and then follow the words, "and all other the freehold hereditaments of him the said *George J. Jarratt*, in the several parishes of *Doncaster*, *Warmworth*, and *Cantley*, in the county of *York*." Then there are the usual general words. The preceding words, although general in the sense that they are not words of specific description—are not general words in the ordinary sense—but the question is whether the advowson passes under these words it not being mentioned in the schedule. Mr. Justice *North* decided that it did not.

We must in the first instance look at the disentailing deed, and we find that the language there used is "hereditaments," and used in such a way that although the advowson was not mentioned, Mr. Justice *North* held—and I do not think he could have come to any other conclusion—that the disentailing deed did comprise the advowson as well as the rest of the estate. There is one clear undisputed point which I think is important. Besides the advowson in question, there was other property comprised in the disentailing deed, which was not comprised in the settlement. For instance, a sum of £2000, which had arisen from the settled estate, and certain lands which were not comprised in the parcels mentioned in the schedule, and were not within the parishes of *Doncaster*, *Warmworth*, or *Cantley*, were omitted. This to my mind is material, because if this deed had been a resettlement

C. A. 1885 CROMPTON v. JARRATT. Cotton, L.J.

of everything which had been disentailed, the Appellants' contention that this resettlement was intended to comprise, together with all the rest of his property, the advowson would have been stronger. Did it then pass under those words?

A good deal of reliance was rightly placed in argument on the case in *Dyer*. That case is thus stated: "Upon evidence in *quare impedit* for the vicarage of *T.*, in the county of *Worcester*, parcel of the possessions of the college of *Westminster*, it was moved, whether the advowson thereof passed in a lease for years made in the time of *Edward* VI., in the second year, to Sir *T. S.* (who was an admiral, and attainted), by the name of 'all the hereditaments situate, lying and being in *T.*,' where the vicarage was, and it was held that it did." We have endeavoured, but unsuccessfully, to obtain the record of that case, and we therefore do not know what the facts were upon which that decision was given; but there is an express statement that it was "upon evidence in *quare impedit.*" There was probably some evidence in that case which we have not here, which had a bearing upon the decision in that case. If the grantor, having no other property at *T.*, had granted a lease of all the hereditaments of the lessor situate, lying, and being in *T.*, I should come to the conclusion that those words were intended to, and in my opinion if intended they can, include an advowson. There is no doubt that it is difficult to see how an advowson which is simply a right to present to a church in a particular place can itself be situate in that place, but still it does concern a particular place. That decision therefore would lay down, and I think correctly, that that description, although not in my opinion an appropriate one, may under certain circumstances pass an advowson.

I would refer to another case of *Gully* v. *Bishop of Exeter* (1), where a passage from *Coke upon Littleton* is quoted, where he is dealing with the *Statute of Westminster* 2. He says there (2), that though tenements is the only word used in the statute, yet "it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; as rents, estovers, commons, or other profits whatsoever granted out of land: or

(1) 4 Bing. 290, 296. (2) Co. Litt. 19 b.; Thomas Ed. vol. i. 514.

uses, offices, or dignities which concern lands or certain places." Then *Best*, C.J., who is quoting that passage, says: "An advowson concerns land and a certain place," and that is what I think Mr. *Wolstenholme* suggested as explaining the description here, and shewing that the words "situate in a certain place" are properly descriptive of an advowson.

Against the case in *Dyer* we must not disregard the case of *Kensey* v. *Langham* (1), where there was a devise of "all other the testator's messuages, cottages, closes, woodlands, and tenements in (among other places) *Hardwicke*, and all other his lands and tenements not thereinafter devised." In the former gift, referring to property in certain places, there is the word "hereditaments," and no doubt that would include an advowson. In the case I have referred to of *Gully* v. *Bishop of Exeter* (2), it was held that "tenement" alone would include an advowson, but in dealing with this case the Lord Chancellor says: "The question is whether the advowson passed to the trustees by the will? And I rather incline to think, that by the first words it does not pass, there being lands lying and being at *Hardwicke*, to satisfy these words; and an advowson being but a right of presenting, cannot be said to be situate." He is dealing with the first part of the gift in which it is pointed out that the word "hereditaments" occurs, which clearly would pass an advowson, and he is dealing with the description of the hereditaments being in certain places. The Lord Chancellor there points out that if there is nothing else in a particular place belonging to the grantor, lessor or testator, then the words "hereditaments and tenements lying or being in that place" may include under the circumstances an advowson, although it is not properly described as being situate in a place. But here we have the opinion of the Lord Chancellor that an advowson being but a right of presenting cannot properly be said to be situate, although he does not go against the case in *Dyer*, admitting, as he does, that although it is not a proper mode of describing an advowson, to speak of it as a hereditament situate in the place where the church is situate, still those words may under certain circumstances pass an advowson.

There is nothing in my opinion in this case to aid the mere words in shewing that the settlor intended to pass under these

(1) Cas. t. Tal. 143. (2) 4 Bing. 290, 296.

C. A. 1885 CROMPTON v. JARRATT. Cotton, L.J.

words, not in themselves apt or proper, an advowson, although it was the advowson of the Church of *Doncaster*. I do not rely on the recitals as negativing the intention, if upon the fair construction of these words by themselves, the advowson would pass; but I agree with Mr. Justice *North* that in this, as in every other case, we must look to the whole of the instrument and regard the facts at that time existing. The settlor had just disentailed certain properties. He does not resettle the whole of them, but uses language which, with this fact that manors undoubtedly are mentioned in the schedule, does pass, so far as is shewn specifically what he intends to pass, lands situate in a particular place, and all of them coming aptly within the description of "hereditaments situate in a particular place." The lands which were excluded, disentailed and not resettled, were in parishes other than the three which I have already mentioned, and although it is true, as Mr. *Wolstenholme* said, that words of general description like these are introduced in order to carry into the assurance anything which by mistake has been omitted, yet in my opinion the things to be swept in must, *primâ facie*, be of the same class and nature as those which have been specifically enumerated. On the ground that, although these words may pass an advowson, they are not apt words to describe it, I am of opinion that the decision of Mr. Justice *North* is right, and the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. [His Lordship shortly stated the facts, and particularly referred to the distinction in the description of the parcels in the two deeds, the language in the disentailing deed being general and comprehensive, while by the recital in the settlement the settlor stated his intention to settle lands described in the schedule which were subject to certain charges, and to the fact that the schedule did not comprise the advowson, and that it was not subject to the charges, and that the settlor also omitted a farm of some twenty or thirty acres which had been disentailed, and continued:—] Then the settlor puts in general words, which run thus, after referring to the schedule: "And all other freehold hereditaments of him, *G. J. Jarratt*, situate in the several parishes of *Doncaster*, *Warmworth*, and *Cantley*, in the county of

York, with the appurtenances;" and then follow the usual general words. I think Mr. *Wolstenholme* was right when he said that these general words were put in for the purpose of sweeping up what had been overlooked; and following that suggestion, the general words which I have read come to this—not that the settlor meant to say he had anything not specified in the schedule, but that if he had anything not specified in the schedule answering this description, it was to pass.

Then comes the question, was the advowson, or was it not, a thing which had been overlooked? If it was overlooked, and if that can be made out, it appears to me that, on the authority of the case in *Dyer*, and even without that authority, these words might include it; but I do not think in point of reasoning it will be right to start with the assumption that the advowson had been overlooked, and say that, being overlooked, it is included in these words. Now is there any evidence to shew that it was overlooked? It appears to me that there is absolutely none, and that to my mind distinguishes this case at once from the case in *Dyer*. That case as reported shews upon the face of it that it was decided upon evidence, by which I mean that it was not a pure question of construction. The very first words of the report are "upon evidence in *quare impedit*." What does that mean to a man who understands legal procedure? That it was not a pure question of construction. It means that there was some evidence before the Court in that case to shew that the general words there used were intended to pass the advowson. The Court held they would pass it, and I am not prepared to say for a moment that these words would not be sufficient to pass it, if there were any reason to suppose that they were intended to have that effect; but I demur to the proposition that we are to look to these words and without evidence approach them on the assumption that the advowson had been overlooked.

Let us next see if there is anything which leads to the supposition that the advowson was not overlooked. It appears to me that there are reasons which tend in that direction. I refer to the recitals and to the schedule—to the fact that the advowson was a thing which is not likely to have been overlooked, and which if it had been foreseen at all would have been provided for. I cannot help thinking that the advowson not being subject

C. A. 1885 CROMPTON v. JARRATT. Lindley, L.J.

to the charges is a little significant. What he intended to settle was that which was described in the settlement subject to charges, and the advowson was not. The tendency is all in that direction, and, but for the case in *Dyer*, I should have thought this was really almost too plain for argument; because nobody could, without stretching language, say that an advowson has any situation at all; and the Lord Chancellor's remark in the case of *Kensey* v. *Langham* (1) shews that he also thought that the language is *primâ facie* not apt to pass an advowson. The case in *Dyer* shews that the language may pass it upon evidence. Here there is none; and upon the true construction of this deed it appears to me that the decision arrived at by Mr. Justice *North* is right, and that the appeal ought to be dismissed.

BOWEN, L.J.:—

I am of the same opinion, and on the ground that, as it seems to me, the words contained in this deed, "hereditaments situate in *Doncaster*," are not apt words to pass the advowson. I think they might pass it if we could gather from the rest of the deed an intention that they should. But *primâ facie*, standing by themselves, they are not apt words to pass it. I think that follows, as has been pointed out, from a simple consideration of what an advowson is. It is a hereditament no doubt, but it is an unsubstantial and incorporeal thing; it is not the bodily possession of the church, but the right to give somebody else the bodily possession of it, and as such it is a right no doubt that concerns the land and concerns a certain place—a right collateral to the land, but not anything that has in itself a situation or spot on which it resides.

We do not know what the facts were in the case in *Dyer*, on which so much reliance has been placed. I do not go quite so far as Lord Justice *Lindley* in saying that you can extract much from the words in which it is quoted; but in fact we cannot tell what that case does really prove. It may be that the words used were large enough to pass an advowson, and that may be an ample and sufficient explanation of the case. The reason given that the view in a writ of right of advowson was to be given in the church is really only putting in an emphatic and illustrative

(1) Cas. t. Tal. 143.

way what we know already, that an advowson is a right of presentation that concerns land and affects it. When we come to the case in *Talbot*, I think that the true principle to be extracted from it has been stated by Lord Justice *Cotton*, i.e. that the Lord Chancellor there rather intimates that the words "lying and being at *Hardwicke*" would not themselves be apt words to describe an advowson, but on the other hand intimates also that they may do so, because he says, "I rather incline to think, that by the first words it (the advowson) does not pass, there being lands lying and being at *Hardwicke* to satisfy these words." In other words, he thinks that if there had been no lands lying and being at *Hardwicke*, the advowson would have satisfied those words. The words might pass an advowson being construed on the principle *ut res magis valeat quam pereat*, but if there were lands which would make the language intelligible, then they would not be apt words to carry what there was no obvious intention to pass by those words. I think therefore, not only that the language of the Lord Chancellor in that case is exactly in favour of the view which I in common with the rest of the Court entertain; but it seems to me that, if the case in *Dyer* is read by the light of the case in *Talbot*, bearing in mind that in *Dyer's* case it may well have been that there was nothing else in the parish of *T.* except the advowson to which these words could be applied, the decision in the former case may perhaps have been upon the principle *ut res magis valeat quam pereat*, i.e. that the words would pass an advowson if it appeared that it was the intention of the parties that they should properly do so. I do not rely much upon the recitals in the deed except in so far as they do not shew any intention that this advowson was to be swept up with the other property. But on the ground that the words "situate in *Doncaster*" are not apt effectually to pass an advowson, I am of opinion that the appeal fails.

Solicitor for Appellants: *S. B. Somerville*, for *Baxter & Co., Doncaster.*

Solicitors for Respondent: *E. & W. Mote*, for *E. Shippey, Manchester.*

M. W.

C. A.
1885
July 27

In re DANBY, an Alleged Lunatic.

Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 3 [*Revised Ed. Statutes, vol. xiv., p.* 189]—*Inquiry when Lunacy commenced.*

The *Lunacy Regulation Act*, 1862, s. 3, takes away the power existing under the *Lunacy Regulation Act*, 1853, sect. 47, of directing an inquiry from what time an alleged lunatic has been of unsound mind.

Opinion expressed by *James*, L.J., in *In re Sottomaior* (1) dissented from.

THIS was a petition stating that *W. Danby* had for more than fifteen years last past been of unsound mind and incapable of managing his affairs. That in May, 1870, he succeeded as heir-at-law to considerable real estate, and that while of unsound mind he had been induced to execute conveyances of parts of his real estate of which he never received the proceeds, and had also been induced while of unsound mind to make large gifts of property and to execute a will. The petition asked for an inquiry as to the lunacy of *Danby*, and as to the time from which he had been of unsound mind.

H. Terrell, for the Petitioner:—

I submit that the words at the end of 25 & 26 Vict. c. 86, s. 3, override the whole section and enable the Court to direct an inquiry from what time the alleged lunatic was of unsound mind if the circumstances of the case render it desirable. In *In re Sottomaior*, Lord Justice *James* clearly decided this.

[Cotton, L.J.:—According to Lord Justice *James'* view, the first part of sect. 3 appears to have no operation. In *Re Stamper* (2) the opinion of Lord Justice *James* in *In re Sottomaior* was not acted upon.

(1) Law Rep. 9 Ch. 677.

(2) The following is a copy of the note of *Re Stamper*, supplied by the Registrar:—

" "In the case of *Re Stamper*, 10th March, 1877, application was made that the inquiry might be carried back. The Lords Justices *James*, *Mellish*, and *Baggallay*, said: 'On consideration, we think inquiry should not be carried back. The Act is positive on the subject.'"

LINDLEY, L.J.:—The section appears to be divided into two parts, to the latter only of which the words at the end apply.]

Sect. 47 of the Act of 1853 is not repealed, and is in very express terms. It would require strong terms in the latter Act to take away the jurisdiction given by the former. Moreover, it is provided that the two Acts shall be read together.

[BOWEN, L.J.:—Is not the discretion given to the Judge who tries the issue? If so it cannot have been intended to give him the power of saying how far the inquiry shall go back.]

"Judge," I submit, refers to the person authorized under the sign manual.

COTTON, L.J.:—

This is an application to have an inquiry directed as to the state of mind of an alleged lunatic, not merely at the present time but from an earlier date. The question whether we have jurisdiction to grant such an inquiry turns on the Act 25 & 26 Vict. c. 86, s. 3. That section enacts that, "The inquiry to be made under every order for inquiry or commission of lunacy or issue, shall be confined to the question whether or not the person who is the subject of the inquiry is at the time of such inquiry of unsound mind, and incapable of managing himself or his affairs." If the clause had ended there no question could have arisen, the clause relating not merely to an ordinary inquiry but also to an issue. Then it goes on "and no evidence as to anything done or said by such person, or as to his demeanour or state of mind at any time being more than two years before the time of the inquiry, shall be receivable in proof of insanity on any such inquiry, or on the trial of any traverse of an inquisition, unless the Judge or Master shall otherwise direct." The question is whether the words "unless the Judge or Master shall otherwise direct" apply to the whole section, or only to the latter division of it: in my opinion they apply only to the latter division. If they are taken to refer to the whole section the section does nothing, for it had been already provided by 16 & 17 Vict. c. 70 (the *Lunacy Regulation Act*, 1853), s. 47, that the inquiry should not be carried

C. A. 1885 *In re* DANBY, AN ALLEGED LUNATIC. Cotton, L.J.

back except by special order. According to the ordinary rules of grammar the words "unless, &c.," refer only to the sentence of which they form a part. Then again, who is to give the direction? The Judge or Master, i.e., the Judge who tries the issue, or the Master who conducts the inquiry. Neither of them has any power to alter the issue or the inquiry. The giving the power to them points to what I think is the true construction of the section—that the evidence is under the direction of the Judge who tries the issue or the Master who conducts the inquiry, subject to this, that the evidence is not to be carried back more than two years except under special circumstances. It has been urged that evidence going back more than two years cannot be material as to a person's present state of mind. I do not agree with this. Acts at any time in a man's life might have some bearing on the question as to his present state of mind, and would be admissible, but it was considered desirable to have a limit, and accordingly it was provided that the evidence should not be carried back more than two years, unless the Judge or Master considered the special circumstances of the case to make it desirable to go further back.

It has been urged that the view I take of the section is inconsistent with the provision in sect. 2 that this Act is to be read as part of the Act of 1853; but that section only provides that the provisions of the earlier Act shall apply "except so far as the same are altered by or are inconsistent with this Act." It appears to me that sect. 3 of the latter Act is inconsistent with sect. 47 of the earlier Act.

We have been pressed with the case of *In re Sottomaior* (1). In that case no doubt Lord Justice *James* expressed a clear opinion that the power of the Court to direct an inquiry when the lunacy commenced was not taken away by the Act of 1862; but Lord Justice *Mellish* gave no opinion on the point. The opinion of Lord Justice *James* is entitled to the highest respect, but in the later case of *Re Stamper* (2), with a note of which from the registrar's book we have been furnished, the Court held that the inquiry could not be carried back, for that the Act was positive. This agrees with our view of the true construction of the section.

(1) Law Rep. 9 Ch. 677. (2) *Ante*, p. 320.

LINDLEY, L.J.:—

If this case is looked at independently of *In re Sottomaior* (1) it appears to me to present no difficulty. The 3rd section of the Act of 1862 is, in my view, plainly inconsistent with the 47th section of the Act of 1853, and impliedly repeals it. The 3rd section is addressed to two different things, first, the inquiry to be directed; and, secondly, the evidence upon the inquiry. The first part of the section says in plain terms that the inquiry is to be confined to the question whether the alleged lunatic is of unsound mind at the time of the inquiry. The second part of the section deals with the evidence to be adduced on the inquiry, and, in my opinion, the words at the end relate only to the evidence. The power is given to the Judge or Master. Now the Judge or Master has nothing to do with directing the inquiry, but has everything to do with the evidence. A rule is laid down that *primâ facie* all evidence more than two years old is to be excluded, but a discretion to admit it is given to the person conducting the inquiry. Apart from authority the case appears to me plain, and *Re Stamper* (2) supports this view.

BOWEN, L.J.:—

I agree. The opinion expressed by Lord Justice *James* in *In re Sottomaior* was not necessary for the determination of that case. It does not appear to have been assented to by Lord Justice *Mellish*, and it was overruled in the case of *Re Stamper*. Apart from authority I think it clear that the inquiry cannot be carried back. The *Lunacy Regulation Act*, 1853, s. 47, enacted that it should not be carried back without special order. In 1861 occurred the famous case of *In re Windham* (3) in which the inquiry lasted for weeks and travelled over the whole lifetime of the alleged lunatic. That case can hardly have been absent from the mind of the Legislature in passing the Act of 1862, the 3rd section of which deals with the same subject-matter as the 47th section of the former Act. The *Windham Case* shews the hardship that might arise from carrying the inquiry back, and the section of the Act of 1862 appears to me to repeal by impli-

(1) Law Rep. 9 Ch. 677. (2) *Ante*, p. 320.
(3) 4 D. F. & J. 53.

C. A. 1885 *In re* DANBY, AN ALLEGED LUNATIC. Bowen, L.J.

cation the similar clause in the Act of 1853. As to treating the words at the end of sect. 3 as extending to the whole of the section, I think that such a view is opposed to the natural construction of the clause, and, having regard to the history of the legislation on the subject, I cannot suppose that the Legislature intended by these words to qualify the first part of the section so as to leave the law where it stood under the Act of 1853. The whole of the latter part of the section appears to me to relate solely to the question what evidence can be adduced in proof of the alleged lunatic being insane at the time of the inquiry.

Solicitors: *Montagu Scott, & Baker.*

H. C. J.

C. A. 1885 KAY, J. *May* 11, 12. C. A. *July* 31.

In re WILLOUGHBY (AN INFANT).

Infant—Guardian—Nationality—Jurisdiction—Grandchild born Abroad of natural-born British Subject—Status of British Subject—7 Anne c. 5 [Revised Ed. Statutes, vol. ii., p. 195]—4 Geo. 2, c. 21, s. 1 [Revised Ed. Statutes, vol. ii., p. 369]—13 Geo. 3, c. 21, s. 1 [Revised Ed. Statutes, vol. iii., p. 19]—International Comity.

If an infant be born abroad whose paternal grandfather was a natural-born British subject, the Court has jurisdiction to appoint a guardian of such infant, although the infant is resident abroad and has no property in this country.

A Frenchwoman, who was the mother of such an infant, and entitled by the law of *France* to the *status* of natural guardian of the infant, was not a person who would have been appointed guardian if she and the infant had been domiciled in *England*, and she had brought proceedings in the French Courts for the appointment of guardians, which proceedings had been directed to stand over until it should be ascertained what course the English Courts would adopt:—

Held, by *Kay*, J., that this was a case in which the English Court should exercise its jurisdiction; and a guardian of the infant appointed accordingly; and *held* by the Court of Appeal, that under the circumstances the decision of the Court below was right.

ADJOURNED SUMMONS.

This was the application of a female infant by her next friend that certain persons might be appointed guardians of her personal estate.

Pauline Willoughby, the infant, was resident in *France*, and her

only property was in that country. Her father, who was in his lifetime British vice-consul in *Paris*, was born and resided in *France*, and in 1868 married in *Paris* a Frenchwoman, and by her he had one child, the infant in question, who was born on the 15th of July, 1872, and was now in her thirteenth year.

The infant's father was himself the son of a natural-born subject of *Great Britain*, and consequently the infant, as the grandchild born abroad of a natural-born British subject, was under the statutes 7 Anne, c. 5, 4 Geo. 2, c. 21, s. 1, and 13 Geo. 3, c. 21, s. 1, and according to *De Geer* v. *Stone* (1), herself entitled to the *status* of a natural-born British subject.

In 1877, Mrs. *Willoughby*, the infant's mother, left her husband, and she never afterwards resumed cohabitation with him. In 1884 the infant's father died in *Paris* intestate, leaving property, all of which was in *France*, to the value of between £4000 and £5000. During her father's life the infant had been properly maintained by her father, who had obtained from the French Court an order prohibiting Mrs. *Willoughby* from visiting her daughter, and at the time of his death the infant was under the care of a schoolmistress in *Paris*. It appeared that according to the law of *France* Mrs. *Willoughby*, the infant's mother, who survived her husband, upon his death resumed her French nationality, and that the *status* of natural and lawful guardian of the infant devolved upon her.

After her husband's death she instituted proceedings in the French Courts for the purpose of obtaining access to the infant, and removing her from the school, and having guardians appointed. These proceedings were opposed by the grand aunt of the infant, and the French Court had postponed the dealing with the case until it was ascertained what course the English Courts would adopt in the matter.

The summons came on for hearing before Mr. Justice *Kay* on the 11th of May, 1885.

Methold, in support of the summons, was stopped by the Court.

J. G. Wood, for the Respondent, the mother of the infant:—

Assuming for the purpose of legal argument only that if this

(1) 22 Ch. D. 243.

C. A. 1885 *In re* WILLOUGHBY (AN INFANT).

infant were domiciled in this country some person other than the Respondent would be appointed guardian, I contend that even if the Court has jurisdiction to appoint a guardian of this infant, this is not a case in which the Court in its discretion will interfere.

The case is one of first instance. By art. 390 of the *Code Civil*, after the dissolution of the marriage by the death of either of the parties, the guardianship of the infant children devolves by law on the survivor of the father and mother. The guardianship of this infant, therefore, by right belongs to her mother, who, under art. 19, upon the death of her husband, resumed her French nationality; and there is no reported case in which the Court has been invited to take away from a foreign surviving parent of an infant domiciled abroad, and with all her property abroad, the guardianship which that parent is legally invested with or entitled to claim. In all the cases there have been these elements: either that there was no legal guardian in existence, or (as in *Hope* v. *Hope* (1)) that such guardian was invoking the assistance of the Court. In *Re Riboldi* (2), where Mr. Justice *Chitty* appointed guardians of an infant British subject domiciled abroad, and whose property was abroad, there was no surviving parent. Having regard to the words of the Lord Chancellor in *Hope* v. *Hope* I do not contend that the Court has no jurisdiction in this case, but that it is just the case with reference to which his Lordship said (3): "I should in all probability not make an order, because the parties would not be within my control, and they might disobey;" and accordingly that the Court in its discretion should refuse to make an order which it has no machinery to enforce.

[KAY, J.:—If in the converse case it were shewn to an English Court that a French tribunal had appointed a guardian, due respect would be paid to that decision; and I cannot assume that Courts so distinguished as the French would differ from our practice in this respect, and decline to exercise this international comity.]

No doubt; but as the French Courts have complete jurisdiction, and can enforce their order, I submit that the English

(1) 4 D. M. & G. 328, 345. (2) Not reported.
(3) 4 D. M. & G. 347.

Courts should, as a matter of convenience, leave it to them to interfere, and should not take away from the mother the rights which the French law gives her, otherwise a conflict might be provoked between the laws of the two countries.

KAY, J. (without calling for a reply):—

I have to deal with the case of a female infant who is resident in *France*. Her father was English vice-consul in *France*, and was born in that country. Her mother was a Frenchwoman at the time she married the infant's father. The grandfather of the infant, it is admitted, was born in this country, and according to the law, as stated in *De Geer* v. *Stone* (1): "the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural-born British subject, would be himself a natural-born British subject, but that his children, if born abroad, would be aliens." Accordingly this child is entitled by statute to all the rights of a natural-born British subject.

The father has died leaving property in *France*, but none in this country. I am told that by the law of *France* the child will be entitled to a share of that property, and the mother, who has survived the father, will also be entitled to some share, he having died intestate. There is no property of the child in this country. It is admitted for the purpose of argument that if the child were here the Court would appoint guardians other than the mother, and would not allow the child to remain in the mother's custody; but it is said that the Court has not the power to appoint guardians of this child, or, if it has the power, it is not a case in which it ought to exercise that power. Now, whether it has the power or not seems to me absolutely beyond controversy after the case of *Hope* v. *Hope* (2). Lord *Cranworth*, in his judgment in that case, says (3): "The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and

(1) 22 Ch. D. 243, 253. (2) 4 D. M. & G. 328, 345.
(3) 4 D. M. & G. 344.

C. A. 1885 *In re* WILLOUGHBY (AN INFANT). Kay, J.

educated; and according to the principle of our law, the Sovereign, as *parens patriæ*, is bound to look to the maintenance and education (as far as he has the means of judging) of all his subjects. The first question then is, whether this principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural-born father born out of the Queen's allegiance are to all intents and purposes to be treated as British-born subjects, of course it is clear that one of the incidents of a British-born subject is, that he or she is entitled to the protection of the Crown as *parens patriæ*." No language can be more clear and emphatic. This child is entitled to all the rights and privileges of a British subject, as much as if she had been born in this country, and therefore it is within the jurisdiction of this Court to provide for the custody and care of this child, who is entitled to such rights.

But the argument has been this: that as the child was born abroad, the mother, the widow of the Englishman whose child she was, is, by the law of *France*, entitled to the guardianship. It is said that possibly there may be circumstances under which the French Courts would interfere with that right, and that possibly this might be a case for such interference. But it is said that the French Courts and not the English Courts are the Courts to which the application should be made. I understand the argument to be this: that because by French law the mother surviving is the guardian of the child, therefore this Court cannot interfere. I cannot conceive why this Court cannot interfere. If I were to say the Court cannot interfere I should be entirely overruling the decision in *Hope* v. *Hope* (1), which is as clear as words can be. I understand the law to be absolutely unquestionable that in the case of every infant entitled to the rights of a British subject this Court has complete power over the care and custody of such a child during infancy. Therefore I reject the argument that there is no jurisdiction to interfere.

The other question is whether this is a case in which the Court in its discretion will interfere. That is quite another matter. The Lord Chancellor in *Hope* v. *Hope* says distinctly

(1) 4 D. M. & G. 328, 345.

that there may be many cases in which the Court having complete jurisdiction may yet in its discretion decline to exercise that jurisdiction, and one of the most obvious cases is where the parents of the child are abroad, and there is no property in this country; in which case, supposing there were a conflict between the parents as to the care and custody of the child, the order of the Court might very likely be a thing which it would have no power to enforce, and which therefore in the exercise of its discretion it might not think fit to make. But in this case I have this remarkable circumstance, that litigation has been commenced in *France* for the very purpose of determining who should have the custody of this child, and the French Courts have done precisely that which the English Courts would have done in the converse case—they have declined to exercise their jurisdiction until these Courts have determined what they think it right to do. If there were an application to the Courts of this country to appoint guardians of a child who was entitled to the rights of a French subject, and not a British subject, and these Courts were informed that there was litigation pending in *France* for the same purpose, although the child were here, the Courts would most certainly, unless there was some instant need of interfering, hold their hands and say, we shall await the decision of the French tribunal as to this French subject, and we shall respect that decision, and shall do everything in our power to carry out that decision when we know what it is. That is precisely the comity which the French Courts have in this very case intimated their desire to exercise with respect to this child, who is not a French subject, and is entitled to the rights of an English subject. In that state of things I feel that the Courts in this country are almost invited to say what they think ought to be done, and that removes every shadow of hesitation which I might under different circumstances have entertained to exercising this jurisdiction.

Therefore although there is no property in this country which I can lay hold of to enable me to enforce the order I may make, I think it right that the Court should in a case in which it is admitted that the mother is not a proper person to be the guardian, appoint English guardians of this English child; and I have no

C. A. 1885 *In re* WILLOUGHBY (AN INFANT). Kay, J.

doubt whatever that when this Court has done that, the Courts of *France* will pay the respect and attention to the orders of the English Court concerning this English child which, as I have said, the English Courts would pay in the converse case with respect to the order of the French Courts as to a French child residing in this country. I shall therefore refer the case to Chambers to determine who are the proper persons under the circumstances to be appointed guardians, this Court being ready and willing to appoint guardians of the person and, if necessary, of the estate of the infant.

W. W. K.

C. A.

From this judgment the mother appealed. The appeal was heard on the 31st of July, 1885.

Hastings, Q.C., and *J. G. Wood*, in support of the appeal, repeated the arguments which had been addressed to the Court below, urging that the English Courts ought not to interfere with the guardian by the law of *France*, and ought not to make an order of this kind when there was in this country neither person against whom nor property in respect of which it could be enforced, and where it might be disregarded by the French Courts.

They also referred to a decision of the French Court of Cassation on the 13th of January, 1873, in the case of *Marincowitch*, *Sirez*, 1873, 1. 13 (the effect of which was stated in certain affidavits made by French lawyers in this matter), and said:—It appears in that case that the nationality of the husband was Austrian, and it was held that the French Courts would not suffer any interference with the duly appointed French guardian, so that if this Court confirms the order of the Court below there may be a direct conflict between the Courts of this country and those of *France*. They also cited *Wellesley* v. *Duke of Beaufort* (1).

Macnaghten, Q.C., and *Method*, for the Respondent:—

[COTTON, L.J.:—Ought the Court to make an order which it

(1) 2 Russ. 1.

has not the means of enforcing or making effectual? Would not a declaration answer the purpose?]

The French Courts will pay due regard and respect to any order which this Court may make, while if this Court made no order, but a declaration only, that would give rise to argument in the French Courts. The Appellant has, however, in an affidavit made by her in this very matter on the 7th of February, 1885, submitted to the jurisdiction of the Court, for she not only states therein that she does not object to the appointment by this Court of some persons here as guardians, but she proposes certain persons for the purpose, and in paragraph 12 she says, "I also caused a *conseil de famille* to be held for the purpose of appointing a guardian of the said infant, but no appointment took place, the *Juge de Paix* who presided declaring that the said infant was English, and therefore under the jurisdiction of this honourable Court, in which decision I coincided."

[COTTON, L.J.:—Could not a recital be put into the order to the effect that the mother had renounced her right to the guardianship?]

We should have no objection to this if it did not hamper the Court.

Hastings, in reply:—

This affidavit was made by Mrs. *Willoughby* at a time when she had not been properly advised as to her position, and being made under a misapprehension, it would not be fair to hold her to it now. She has since withdrawn any renunciation of her rights, and is at liberty to raise any objection she can to the making of this order.

COTTON, L.J.:—

This is an appeal from an order made by Mr. Justice *Kay*, appointing guardians of an infant not resident in *England*, and whose mother, the surviving parent, is a Frenchwoman, resident in France, and by French law the guardian of the infant. Of course it is only under extraordinary circumstances that the Court would make an order when the infant is not here, and when

C. A. 1885 *In re* WILLOUGHBY (AN INFANT). Cotton, L.J.

there is no property here, and when the persons who have the custody of the infant are not subject to the jurisdiction, as they would be if resident in this country.

The case has been argued on several grounds. The first was that this Court has no right to interfere with the position of the widow, who, by the French law, is the guardian of this child, and that to do so would lead to a collision with the French Court.

Now, in my opinion, this Court has jurisdiction to appoint guardians in a proper case of any infant who is a British subject, wherever that infant may be residing, and whoever may have the custody of that infant abroad. As to leading to a collision with the French Court, in my opinion no such collision will take place. It is not like the case which has been referred to where a guardian by the law of the nationality sought, without anything more, to interfere with the rights of the French guardian, that is to say, with the rights given to a French subject who was the guardian by French law. But it is an application made to this Court, which has undoubtedly jurisdiction in the matter, to appoint a guardian as against the person who at present is, by law in *France*, the guardian of the infant. When the parties are all English and domiciled here, our Courts exercise that jurisdiction as against a person who by English law has a right to the guardianship. This Court holds, and I should suppose that every Court in a civilised country would hold, that if the particular person on whom the law throws the guardianship of an infant so conducts himself that it is impossible for him to be its guardian, then it is the duty of the Crown here, or whoever exercises the same authority in a foreign country, to interfere, and to say that this legal guardianship ought not to be abused; and if there is a probability, from the facts brought before the Court that the legal guardianship will be abused by such person, then the Court will interfere and appoint guardians of its own—in that sense, but not otherwise, interfering with the legal rights; because, on behalf of infants, this Court will, and ought to interfere with a legal right if it is abused. Therefore, while recognising the position of this lady as guardian of the infant child by the law of *France*, of which country she is a subject, and where the infant and she are both residing, I think it is within the

C. A.
1885
In re WILLOUGHBY (AN INFANT).
Cotton, L.J.

power of this Court, and that it is the duty of this Court in a proper case, subject to what I shall presently mention, to interfere and appoint guardians.

Then it is said that this will, or may, lead to conflict with the French Courts. In my opinion there is no probability of that. Apparently the matter has been before the French Courts, and we are told that this lady, who is the guardian by the French law, has said that the child is a British subject, and that it is a question for the English Courts, and the case stood over in *France* after that with knowledge of these proceedings. I may say that we in no way intend to overrule, or dictate to, or interfere with the Court in *France* in exercising its jurisdiction over this guardian, and over her infant child. There may be, and there are occasionally, guardians in two countries. Where there is a guardian appointed in a foreign country in which an infant is domiciled, if that infant comes here, this Court may, in a proper case, appoint a guardian, but it would be wrong for the Court to act in violation of the wishes of the guardian appointed by a Court of a foreign nationality. It may, however, assist and enable the authority of the Court to be carried into effect in this country. I am speaking of what would happen as regards an infant in *England*. There is a case of *Nugent* v. *Vetzera* (1), before Vice-Chancellor *Wood*, where, there being an Austrian guardian and an English guardian, the question arose as regards a boy who was at school over here, and the Court, although not allowing interference with the guardians appointed by the Court of the nationality, still refused to discharge the appointment of the English guardians. The legal guardian by the French law does not seek to say that her conduct is such as to make it right for this Court (having jurisdiction) to leave the infant in her charge, and she is here appearing before this Court by counsel. As she does not wish to justify her conduct, and does not seek any investigation into it, we must assume that there are circumstances which would make it right for this Court to interfere, and to take away the guardianship from her if she were a guardian appointed by English law. Therefore, without desiring in any way to interfere or to come into collision with the French Courts, it is right for us as the Court of the nation to which the infant

(1) Law Rep. 2 Eq. 704.

C. A. 1885 *In re* WILLOUGHBY (AN INFANT). Cotton, L.J.

belongs to express an opinion that under the circumstances, which are rather conceded than established by evidence (for as far as I know there is no evidence about it), this is a case where guardians ought to be appointed of this infant, especially having regard to the second paragraph of the affidavit which has been filed by Mrs. *Willoughby*. I think the proper course was taken in this case in referring it to Chambers to ascertain who were fit and proper persons to be appointed guardians of this infant.

Before I go to the remaining question, whether we ought to abstain from exercising our jurisdiction, because we cannot enforce our order, I will say a word about the affidavits of certain French lawyers which have been filed in this matter as to the French law. They refer to a case which has been decided by the Court of Cassation, and somewhat differ; but when one comes to look at the case referred to, in my opinion that decision of the Court of Cassation is in no way contrary to our view. It is simply this, that a foreign guardian will not be recognised as having by his mere appointment, or his mere position as foreign guardian, whether appointed by the law, or by an order of the Court of the foreign country, a right to interfere as against the authority of the person whom the law of *France* has constituted and appointed guardian; and if the persons whom we may appoint guardians seek to interfere, they will meet with a similar decision. It may well be that this order may assist the French Court. It may well be that the French Court may give effect—though I do not say they ought to give effect—to our order, and make it operative by giving to the persons whom the Court here thinks ought to be appointed guardians power in *France* to deal with the infant and the property there, or it may, if it thinks fit, appoint those persons guardians. It will be entirely a question for the French Courts. If on the other hand the French Court thinks that other persons ought to be appointed guardians, that is a matter with which we in no way interfere.

The only remaining point is this: Ought we to make the order when there is neither property nor person here against whom it can be enforced? That is the difficulty. But having regard to the special circumstances of this case, and to the litigation that is going on in *France* as against the person whom the law of *France* has constituted the legal guardian of this infant

I think it would be wrong to refuse to make an order. It may assist the French Court in determining what is right to be done in the litigation going on there, especially having regard to the objection taken by the French guardian, and to the fact that the proceedings in *France*, whether by consent or otherwise, stood over in order that there might be a decision in these proceedings in the Court of *England*—the Court of the country of the infant's nationality. In my opinion the order appealed from was right.

LINDLEY, L.J.:—

This is a curious case. The infant is English by nationality and French by domicil. Her father is dead, and her mother is by the French law under the *Code Civil* the guardian of the infant. The infant is not resident here, and has no property here; therefore it is a little strange that this Court should interfere by appointing a guardian, inasmuch as the guardian so appointed will have no authority in *France* and can do nothing here. The case is singular for these reasons, but it does not follow that the order ought not to be made.

Now I am very much struck with the affidavit of this lady. It would not be right, after what Mr. *Hastings* has just said, for this Court to pin her to that, and say that she has submitted to the jurisdiction, or anything of that kind. I think she is entitled to raise every objection which she can. But that affidavit is important because she not only says in paragraph 2 that she does not object to the appointment of persons here, but she proposes in paragraph 7 some persons to be appointed by this Court, and at the end of paragraph 12 she says that the *Juge de Paix* who presided over the *Conseil de Famille* declared that the infant was English, and therefore under the jurisdiction of the English Courts, and that she coincided in that decision. Well, now, having taken that line it is a little singular that she should oppose the making of such an order as that made by Mr. Justice *Kay*—a common order referring it to Chambers to appoint proper persons to be guardians. It appears to me that having regard to the proceedings in the French Court, and to the fact, as I understand it, that the order of this Court will assist them, although of course it will not bind them, there is a reason for departing from the usual rule,

C. A. 1885 *In re* WILLOUGHBY (AN INFANT). Lindley, L.J.

which is against making an order which cannot be enforced. The case is very special and very unusual. I think Mr. Justice *Kay* felt that. The observations he made in the course of his judgment shew that he did; and under those very peculiar circumstances I think the order ought to be made.

In reference to the Austrian decision, Lord Justice *Cotton*, has I think, given the true explanation of it. I will only add this, that we know perfectly well that precedents in *France* are not followed as precedents are in *England*, whether they are decisions of the Court of Cassation, or any other tribunal. Therefore I think the appeal ought to be dismissed.

Solicitors for Appellant: *A. F. & R. W. Tweedie.*
Solicitor for Respondent: *F. Rolt.*

W. W. K.

C. A. 1885 PEARSON, J. *June* 2. C. A. *July* 1.

NOYES *v.* POLLOCK.

[1882 N. 1497.]

Mortgage—Mortgagees in Possession—Account of Rents and Profits—Liberty to surcharge.

The Defendants had by the judgment in the action been held to be mortgagees in possession of certain mortgaged estates, and the usual accounts and inquiries as against mortgagees in possession were directed. The Defendants brought in an account purporting to shew their receipts in respect of the rents and profits of the mortgaged estates, but which in fact only shewed certain lump sums received by them from one *J. H. Blood*, then deceased, their agent.

On motion by the Plaintiff for a further and better account:—

Held, by *Pearson*, J., that the account was sufficient and that the Plaintiff's proper course was to surcharge the Defendants:—

Held, by the Court of Appeal (reversing the decision of *Pearson*, J.,) that the Defendants were bound to render the further account, for that the receipts of *Blood* were as between the Plaintiff and the Defendants the receipts of the Defendants; the Defendants were bound to deliver an account shewing not only what they had received from *Blood* but what he had received from the tenants, and that it was a question not of technicality but of substance, for without the knowledge derived from such an account the Plaintiff would be unable to proceed on the inquiry as to wilful default, which was a matter of surcharge, and that the death of the Defendants' agent could not excuse the Defendants from this liability.

BY the judgment in this redemption action made on the 14th of July, 1884, it was declared that in taking the accounts there-

inafter directed the Defendants, as the trustees of the *London Life Association*, were to be treated as having been mortgagees in possession of certain estates comprised in the mortgage security, being the estates in *Sussex*, as from Michaelmas, 1869, to the 3rd of August, 1878.

And the judgment directed (1.) an account to be taken of what was due to the Defendants for principal, interest, and costs; (2.) An account of the rents and profits of the hereditaments comprised in the several mortgage securities received by the Defendants as such trustees or by any other person or persons by the order or for the use of the said Defendants or any of them or of the association, or which, without the wilful default of the said Defendants or any of them, might have been so received; (3.) A statement whether any and what parts of the hereditaments comprised in the said mortgages have been sold, and if so, by whom and for what sums of money, and by whom the purchase-moneys had been received and how the same had been applied.

On the 3rd of March, 1885, the Defendants brought in an account and statement of sales, which, however, were objected to as insufficient, and by a four-day order, made in Chambers on the 22nd of April, 1885, they were directed to bring in a further and better account of the rents and profits received by them or by or for their order or use, and the order went on (through some mistake) to direct an account to be left by them of that which but for their wilful default might have been so received. A further account and statement called account B was brought in on the 14th of May, 1885.

The Plaintiff objected that account B was still insufficient as regarded the *Sussex* estates, inasmuch as as it did not shew the sums actually received by the Defendants' agents from the different tenants, or the application of the sums, but merely gave lump sums as received by the Defendants from one *J. H. Blood*, who by the judgment had been declared to be their agent, and by his successor, *E. Drawbridge*, *e.g.*, "2 June, 1870. *J. H. Blood*, rent *Sussex*, £591 7*s.* 10*d.*" "7 May, 1873. *J. H. Blood*, rent *Sussex*, £400." "1876. Dec. 13, *E. Drawbridge*, rents *Sussex*, £202 6*d.*" The Plaintiff also objected to the statement of sales on the ground that while it shewed the premises sold, and the

C. A. 1885 NOYES v. POLLOCK.

purchasers, and the purchase-money, it in no instance gave the dates.

The Plaintiff accordingly, on the 19th of May, 1885, took out a summons before Mr. Justice *Pearson* for a four-day order that the Defendants might put in a further and better account and statement verified by affidavit.

The secretary of the association by his affidavit of the 13th of May, 1885, deposed that the Defendants did not, till the date of the judgment in the action, consider that they were mortgagees in possession, and stated that the person from whom the sums representing the accounts of the *Sussex* estates were received by the association was *J. H. Blood*, who when sending such receipts did not render an account shewing how each remittance was arrived at, and under the circumstances was not required to do so; that he had died before the institution of the action, and that the Defendants could not therefore ascertain from him the particulars relating to such rents, and up to that time had been unable to ascertain such particulars from any other person. It did not appear, however, that the Defendants had taken any steps to get further information.

The summons came on by way of motion before Mr. Justice *Pearson* on the 2nd of June, 1885.

Higgins, Q.C., and *Latham*, for the Plaintiff.

Stirling, for the Defendants, offered to supply a statement of the dates when any parts of the hereditaments comprised in the mortgages were sold, and when the purchase-moneys were received.

PEARSON, J.:—

The principal object, or one of the principal objects, of this action was to determine on what terms the *London Life Association* were to be redeemed, and to have the accounts taken as against them to ascertain whether or not they had been paid off, or whether any or what amount was still due to them in respect of their mortgages upon certain properties in *Sussex* and elsewhere.

The contention before me on one side was that the Defendants were, and on the other that they were not, to be treated as mortgagees in possession. I came to the conclusion that, with regard to the *Sussex* estates they were to be treated for certain periods as mortgagees in possession. That being so the usual accounts were directed as against mortgagees in possession.

The case was this: The real question was whether Mr. *Blood*, who is now dead, was at a particular time to be considered as having acted as agent for the tenant for life and received the rents on his account, or whether he ought to be deemed to have acted then as agent for the association and to have received the rents on their behalf. If the latter was the truth then the Defendants were mortgagees in possession, and the Court arrived at that conclusion. Accordingly an account has been ordered to be taken against them of all the rents and profits of the hereditaments comprised in their mortgage security received by them or by any person or persons by their order or for their use—reading the order shortly. To suppose that they are upon this four-day order to render an account of all the rents and profits which without their wilful default they might have received would be laying down a rule which to my mind is novel and in most cases would be highly absurd. Mr. *Blood* having been determined to be their agent, it turns out that they had received from him from time to time sums—I may say *en masse*—not sums divided between the rents of different tenants naming them—but the total which he had in his hands to pay over to them, whether paid yearly, half-yearly, or quarterly, I know not. With these sums they have charged themselves, and to my mind, having taken in the accounts, they have rendered the account which they were ordered to render.

It is said that they might get from Mr. *Blood's* representatives, or from persons who acted as solicitors for a Mr. *Drawbridge*, who on Mr. *Blood's* behalf received the rents directly from the tenants, some further account. If they can I do not know why the Plaintiff should not be able to get them. The Plaintiff is the widow of the tenant for life, and her only interest is a rent-charge by way of jointure, but all her family are as much interested in the property as the Plaintiff is, and I should imagine that the family

C. A. 1885 NOYES v. POLLOCK. Pearson, J.

would know everything about the tenant's property and the rents they ought to have paid much better than the association. The Plaintiff is at present entitled to surcharge the association with any amount of rents which the tenants ought to have paid, and which if paid would have exceeded the £591, to take one figure in the account which they admit they have received in a particular year, and if they could shew that the tenants owed more rent at that time, and ought not to have been excused from paying more rent—that would be a fair item of surcharge from which the association would have to discharge themselves as best they could. I think therefore that the account rendered is the proper account, and, as I have said, they cannot be asked to render an account of rents and profits which without their wilful default they might have received.

The four-day order should not have been made in that form, and I decline to act on that part of it now although more than twenty-one days have passed since the date of the order. That was the proper duty of the surcharge, and what is directed by the judgment is not that they shall render an account, but that an account shall be taken, so that if the parties seeking to redeem have a case for a surcharge they may make it.

The other part of the case relates to the times at which certain moneys arising from the sale of certain properties which were sold were received. The inquiry says nothing as to the time at which these sale-moneys were received. I am surprised to find that the order, following the common form, does not contain that, but Mr. *Stirling* on behalf of the association offers to give an account shewing at what times they were received.

The motion was dismissed with costs.

The judgment finding the Defendants mortgagees in possession was under appeal.

C. A.

The Plaintiff appealed from this dismissal. The appeal was heard on the 1st of July, 1885.

Higgins, Q.C., and *Latham*, for the Appellant:—

The further account delivered by the Defendants does not satisfy the order of the 22nd of April so far as regards the *Sussex*

estates. It does not shew what their agents received or from whom, but only lump sums which they have received from their own agents. As between the Plaintiff and the Defendants the receipts of the agents are the Defendants' own receipts. The Plaintiff cannot surcharge, before ascertaining what the agents have received, and this information would not be afforded to the Plaintiff.

Then the account of sales does not give any dates. The Defendants say that the inquiry in the order does not mention dates, but the usual form of order does not: *Seton* on Decrees (1); dates are involved in the very idea of an account.

Stirling (*Rigby*, Q.C., with him) for the Defendants:—

An account no doubt does require the dates to be mentioned, but this is not an account, but a special kind of inquiry, which the Defendants have strictly complied with. However, we have no objection to inserting the dates.

As to the receipts, so long as the judgment in this action which is now under appeal stands, the Defendants must be treated as mortgagees in possession, and the receipts of the agents must be treated as ours, but the proper course is for the Plaintiff to surcharge us and not to compel us to render an account which will make us liable for everything that may be shewn to have been received by either of our agents, and necessitates our proving strictly every item of discharge. The judgment does not bind *Blood*, and in all probability the account desired will involve us in litigation with his representatives.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson* refusing to order the Defendants, who have been adjudged to be mortgagees in possession, to give further and better accounts of the rents and profits of the mortgaged property received by them or for their use.

An order was made in the action on the 22nd of April requiring the Defendants, as trustees of the *London Life Association*, to deliver an account as mortgagees in possession of the rents and

(1) 4th Ed. p. 1068.

C. A. 1885 NOYES v. POLLOCK. Cotton, L.J.

profits of the mortgaged property received by them or by any person or persons for their order or for their use. And the order went on to require accounts based on the footing of wilful default. My view is that these latter words were introduced *per incuriam*, and that the account should be limited to what has been received by them or their agents. What they have done is this: There are estates in *Sussex* of which the Defendants have been held to be mortgagees in possession, and it has also been held that *Blood*, the solicitor who received the rents, was their agent.

It is no doubt quite true that as between *Blood* and the Defendants the Defendants have received only what they have received from *Blood*, but as between themselves and the Plaintiff they must be treated as having received everything which was received by their agent, and they must accordingly give an account not only of what *Blood* has handed over to them but of what he has received from the tenants. This is no mere technicality, for the Plaintiff, unless she obtains an account of what *Blood* received and from what tenants he received it, has not got the materials which would enable her to surcharge the Defendants with that which they or their agents ought to have received, and which is a proper subject for surcharge. This account is wrong. The Plaintiff is entitled to ask the Defendants what *Blood*, acting on their behalf, received and from whom? And that they must set out.

It is said that *Blood* is dead, and that the Defendants may accordingly be unable to obtain such an account without action. The Court has nothing to do with that. The Defendants are entitled to require accounts from their own agent, and we cannot suppose that the son of their late agent and his successor in business will resist their application for an account which, as executor of his father, he is in duty bound to render. The same observations apply of course to the receipts of *Drawbridge*. It will be for the Plaintiff when the further account is put in to question it, and contend that the Defendants should have received more, and, if she desires so to do, to surcharge them with that.

We must treat the judgment which has been delivered in this action for the present purpose as binding; no stay of proceedings has been directed, and so we must allow the Defendants only a

reasonable time, which we place at one month, within which to obtain the necessary information. Mr. Justice *Pearson*, deciding contrary to our view, ordered the Plaintiff to pay the costs. That I think is wrong. The Defendants are in fact seeking to evade the decision which treats them as mortgagees in possession and their agents' receipts as their own. That they have no right to do, and they must bear the costs of this application both here and below.

LINDLEY, L.J.:—

I am of the same opinion. The question as to receipts is one of importance—a question of principle. It appears obvious that the mortgagees must account for what they have received from the tenants and occupiers of the land, of which by the decision they have been held to be in possession, and everything that their agent has received they have received—everything which they have received by their agent is an item for which they are liable to account. Two persons seem to have acted for them as their agents, *Blood* and *Drawbridge*. [His Lordship briefly detailed the facts and proceeded—] The Defendants say they cannot obtain the information which the Plaintiff requires; but they have really taken no steps whatever to obtain from *Blood's* son and successor any further accounts. They cannot escape from their liability by saying "We give you an account of what we received from *Blood*." The same remarks apply to *Drawbridge*. If they find any difficulty in obtaining the further information they must apply for further time within which to bring in the accounts. It may possibly be that an action may be necessary, but with that the Plaintiff has nothing to do.

FRY, L.J.:—

I cannot agree with Mr. Justice *Pearson* in this case. It appears to me that the Defendants were bound to treat the receipts of *Blood* and *Drawbridge* as their own receipts. They ought therefore to have accounted for the moneys received by these two agents. It seems to me that the Defendants in making out their accounts endeavoured to take their stand upon the same ground

C. A. 1885 NOYES v. POLLOCK.

on which they failed at the trial, viz., that they were not mortgagees in possession and that Mr. *Blood* was not their agent.

The order suggested by Lord Justice *Cotton*, I consider the proper order to make; one month will give them ample time to obtain the information required.

Solicitors: *Walters, Deverell, & Co.*; *Druces, Jackson, & Attlee.*

M. W.

C. A. 1885 *July* 9.

In re MOODY AND YATES' CONTRACT.

Vendor and Purchaser—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 4, 6—*Peppercorn Rent—Evidence of Title.*

The *Conveyancing and Law of Property Act*, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent, so as by the production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of shewing, that the covenants with their lessor (to finish the house within —— months to the satisfaction of the lessor's surveyor), have been duly performed and observed.

The certificate of the lessor's surveyor that the house has been finished to his satisfaction, is not a "certificate" or "evidence" within sect. 3, sub-sect. 6, the expense of obtaining which must be borne by the purchaser, but it is part of the title itself.

Decision of *Chitty*, J., affirmed.

APPEAL of *Moody* and *Highett* from a decision of Mr. Justice *Chitty*. The facts of the case are set forth in the report of the hearing before him (1), and here it is necessary to give only the following short statement of them.

A house had been demised to *Moody* and *Highett* for a term of ninety years from the 25th of December, 1881, at the yearly rent, until the 29th of September, 1884, of a peppercorn, and during the residue of the term of £7 payable quarterly; the first quarterly payment on the 25th of December, 1884. And the lease contained a covenant by the lessees to finish fit for habitation within six calendar months from the date thereof at their own cost the house with proper boundary walls or fences and drains to the satisfaction of the surveyor for the time being of the lessors, and with all necessary fixtures and fastenings to the same. In April, 1884,

(1) 28 Ch. D. 661.

Yates agreed to buy this house of *Moody* and *Highett*, and in his requisitions on the title the purchaser required the certificate of the lessors' surveyor, that the premises had been completed to his satisfaction in accordance with the covenant in the lease, to be produced and handed over on completion. The vendors in reply offered to obtain the certificate at the purchaser's expense and also a receipt for a peppercorn; the vendor insisted on the certificate of the lessors' surveyor being handed over to him free of expense. The vendors having taken out a summons in Chambers under the *Vendor and Purchaser Act*, 1874, for the purpose of obtaining a declaration that a good title had been shewn, it was adjourned into Court; and Mr. Justice *Chitty* there decided in favour of the purchaser and dismissed the vendors' application. They appealed, as has been already stated.

Robinson, Q.C., and *Spence*, for the vendors:—

The handing over of a peppercorn is a payment of rent within the meaning of sect. 3, sub-sect. 4 of the *Conveyancing and Law of Property Act*, 1881. The meaning assigned to the word "rent" in sect. 2, sub-sect. 9, is very wide and will include a peppercorn rent. Sect. 65 also throws light on the present case: a peppercorn is there treated as a "rent" in the ordinary sense of the word.

[FRY, L.J.:—Surely the language of that section is against the argument for the vendors. Can a peppercorn be paid? The word "paid" implies something of money's worth.]

A heriot due by custom is said to be "paid," although it may be a horse or an ox.

Then if it be necessary to procure a certificate from the lessors' surveyor that the covenant has been complied with, the purchaser must pay the cost: sect. 3, sub-sect. 6, clearly applies.

[FRY, L.J.:—It was held upon appeal to this Court in the case of *In re Johnson and Tustin* (1), reversing the decision of Mr. Justice *Pearson*, that sub-sect. 6 applies only where a proper abstract of title has been furnished; that enactment assumes the existence of a proper abstract. Moreover, is not the surveyor's

(1) 30 Ch. D. 42.

C. A. 1885

In re MOODY AND YATES' CONTRACT.

certificate part of the vendors' title? It is something to be "created" not "procured."]

If this Court decides against the appeal, it will be necessary in every abstract of title upon the sale of a lease to state the payment of the rent, in order to shew that the lease has not been forfeited. Moreover in sect. 65 of the *Conveyancing and Law of Property Act*, 1881, the word "payable" seems to be used with respect to a peppercorn rent.

[FRY, L.J.:—Even if that is so, I am not convinced that because a word is used inaccurately in one section of a statute, it must be assumed to have been used inaccurately when it occurs in another section of the same statute.]

P. F. Wheeler, for the purchaser, was directed to confine his argument to the question, whether the vendors were bound at their own cost to obtain a certificate of the surveyor's satisfaction:—

The satisfaction of the surveyor is necessary to enable the vendors to convey a good title; without it their title would be bad; therefore the certificate of his satisfaction must be obtained by them in order that a good title may be vested in the purchaser. Sect. 3, sub-sect. 6, does not apply.

Robinson, in reply.

BRETT, M.R.:—

The first point is whether the production of a writing shewing that a peppercorn has been handed over is the "production of the receipt for the last payment due for rent under the lease," within the meaning of the *Conveyancing and Law of Property Act*, 1881, s. 3, sub-s. 4. I think that it is not. A peppercorn is very seldom handed over except under the stress of a case like this; and when it is handed over, it is not the payment of rent due under a lease; and the writing shewing that it has been handed over, is not a receipt for the payment of rent. But I must go further and say whenever a rent in kind is reserved,—such as the delivery to the landlord in an agricultural lease of a portion of the crops of hay, or in a mining lease of a part of the coals or

minerals won from the soil—although it is a real rent, it does not fall within the statute, which applies only where there is a payment in money. In other cases, such as those which I have mentioned, rent is yielded or rendered, not paid.

That view of the construction of the statute drives me to consider, whether the title and the evidence of it have been properly dealt with. The value of the lease depended upon the question whether a certain covenant had been fulfilled: that covenant was that the house should be finished fit for habitation to the satisfaction of the lessors' surveyor. It is necessary to consider the meaning of a covenant of that kind which must be performed in order that the lease may be valid. The covenant does not refer to the satisfaction of the surveyor in his own mind, but it means his expressed satisfaction. That being so, it was necessary that the vendors should state that the expressed satisfaction of the surveyor had been obtained. But it is not stated, and therefore I think that the vendors' title was bad. The objection is taken by the purchaser in a form which admits of two constructions: the one construction is that no expressed satisfaction of the surveyor having been procured the vendors have not obtained what is a necessary part of their title: the other is that the cost of procuring the surveyor's certificate ought not to be borne by the purchaser. When I look at the *Conveyancing and Law of Property Act*, 1881, s. 3, sub-s. 6, it seems to me not to apply to a case like this. The expression of the satisfaction of the surveyor is part of the title; an outward expression is substantially the only mode in which it can be shewn, that the satisfaction of the surveyor really exists; it is part of, and not merely evidence of, the title itself, and therefore the certificate of the surveyor's satisfaction does not fall within sub-sect. 6, which refers only to certificates being evidence of title, and not to certificates being part of the title itself.

I think that the judgment of Mr. Justice *Chitty* must be affirmed.

BAGGALLAY, L.J.:—

I am of the same opinion. In April, 1884, *Yates* agreed to buy a small house: *Moody* and *Highett*, the vendors, held the

C. A. 1885 *In re* MOODY AND YATES' CONTRACT. Baggallay, L.J.

house upon a lease at the yearly rent of a peppercorn up to the 29th of September, 1884, and afterwards of £7 payable quarterly: but the lease contained a covenant by the lessees to finish the house fit for habitation to the satisfaction of the surveyor of the lessors. The performance of that covenant was a condition precedent to the acquisition of the property by the vendors, and without it they could not lawfully convey it. I agree with the Master of the Rolls that the satisfaction of the surveyor must be expressed in some form, it might be in some form of writing; and I think that a written certificate of satisfaction ought to have been procured. Probably the lessors would have a right of re-entry if the covenant to complete has not been complied with, and the lease would be liable to determine; and there is nothing to shew that the lessors' surveyor is satisfied. I think it ought to have been stated in the abstract that the house had been completed to the satisfaction of the surveyor. The purchaser insisted that a certificate should be procured; the vendors were willing to procure a certificate at his expense; but that is a document which ought to have been in their possession. It is true that there is no magic in the form of the certificate; but it is part of their title and without it they cannot effectually convey to the purchaser. I need not repeat what has been said by the Master of the Rolls, and it will be sufficient to say that in my opinion the handing over of a peppercorn would not be the payment of rent within the *Conveyancing and Law of Property Act*, 1881, s. 3, sub-s. 4. As to the point taken with regard to sub-sect. 6, it is to be recollected that this certificate is an expression of an opinion and is part of the title; the enactment cited refers to certificates of baptism, birth, or burial, and of matters of a similar nature; and I go further and am prepared to hold that if any document in writing forms part of the title to property, it does not fall within sub-sect. 6.

I think that the judgment of Mr. Justice *Chitty* was right, and that this appeal must be dismissed.

FRY, L.J.:—

I am of the same opinion. I think that the rendering of a peppercorn is not a payment of rent within sect. 3, sub-sect. 4.

It may be said that if this construction is to prevail, we must hold that even a rendering of a substantial portion of the produce under a lease of mines would not be within that enactment; but I see no difficulty in that, because the result would be simply to leave the effect of such a render to the old law. At all events it is clear to me that the rendering of a peppercorn is not a payment of rent within the meaning of the enactment.

Another point raised was more difficult; but it seems to me that the vendors were bound to state the expressed approval of the lessors' surveyor as part of their title. I think that the approval of the surveyor within his own breast goes for nothing: it is not such a fulfilment of the covenant as could be alleged against a purchaser. There is nothing from which an approval can be implied. Suppose that the lease had been sold after the rent had been paid for a series of years; in that case I think that the approval would have been implied, and I do not understand the Master of the Rolls to have laid down that in a case like that an express approval would be necessary. But in the present case a very short time had elapsed since the lease was granted, and I think that the vendors were bound to shew the expressed satisfaction of the surveyor. I think that the abstract was not sufficient; and I adhere to the opinion which I expressed in the case of *In re Johnson and Tustin* (1), that sect. 3, sub-sect. 6, assumes that a proper abstract has been delivered: in the present case the approval of the lessors' surveyor is not merely a matter of evidence; the expression of the approval and the evidence of that expression are required, and this certificate is both. The certificate of the surveyor's approval is not like a certificate of a pre-existing fact, such as a birth, a marriage, or a death; but it is the fact itself, and forms part of the vendors' title, which must be procured at their expense.

Solicitors: *E. Dean,* for *S. G. Edridge, Croydon*; *Pedley & Bartlett.*

(1) 30 Ch. D. 42.

J. E. H.

C. A. 1885 PEARSON, J. *June* 12. C. A. *July* 15, 16.

NEWHAVEN LOCAL BOARD *v.* NEWHAVEN SCHOOL BOARD.

[1885 N. 531.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 158; *Sched. I., rr.* 2, 9; *Sched. II., Part I., r.* 65; *Part II., r.* 2 [*Revised Ed. Statutes, vol. xvii. pp.* 568, 569, 628, 636, 638]—*Quorum—Casual Vacancy—Lapse of Board —Informality—Building Line—Acquiescence.*

Seven members of a local board constituted under the *Public Health Act*, 1875, and consisting of nine members, resigned, so that the quorum of three required by Sched. I., r. 2, was not left. The two remaining members proceeded to fill up the vacancies. The board as thus constituted prescribed a building line under sect. 155 of the Act:—

Held, by *Pearson*, J., that, as the resignations reduced the number of members to less than a quorum, the board had lapsed, that the two remaining members could not fill up the vacancies, that there was therefore no board, that the building line was therefore not well prescribed, and that Sched. I., rule 9, to the Act did not cure the defect.

Held, by the Court of Appeal, that the filling up of vacancies was "business" within the meaning of Sched. I., rule 2, that the two members were not competent to transact it, and that the new members therefore were not duly elected, but that by Sched. I., rule 9, the objection to the building line, founded on the fact that some of the members of the board were not duly elected, was removed.

The Defendants being about to pull down a school and erect a new one, submitted plans to the local board. The local board objected to the plans, giving as a reason that they violated a by-law, which obliged a person laying out a new street to leave it of a certain width. This by-law was not applicable, as *South Lane*, on which the school fronted, was not a new street. The Defendants disregarded the objection, commenced their works on the 5th of January, 1885, laid the foundations of the main wall towards *South Lane* on the 12th, and proceeded rapidly with the erection of it. On the 22nd of January the local board prescribed a building line which did not interfere with the main wall, but would prevent the erection of certain annexes not then commenced, lying between *South Lane* and the main wall, which annexes were shewn on the plans laid before the board. The Defendants had ground enough to allow of the annexes being erected elsewhere. The Defendants proceeded with the annexes, and the board brought their action to restrain them from building beyond the line, and to compel them to pull down what they had built beyond it:—

Held, that where a building is taken down to be rebuilt, a building line may be prescribed under sect. 155, for any portion of it which has not been commenced, although other portions have been commenced, unless what has been commenced necessarily involves as a matter of construction

a projection beyond the line afterwards prescribed, and that here no such necessity existed, as the annexes could be erected elsewhere. That the commencement of the main building therefore did not preclude the board from laying down a line which would prevent the erection of the annexes which had not then been commenced.

Held, also, that as the notice given by the board, though ineffectual for the purpose of empowering them to pull down the erection under sect. 158, gave the Defendants to understand that the board objected on the ground that buildings according to the plan would make the street too narrow, the board had not done anything to induce the Defendants to believe that they would not prescribe a building line, and that there was no equity to prevent the board from exercising their powers under sect. 155 on the ground that they had misled the Defendants.

THE *Newhaven* Local Board was constituted under the *Public Health Act*, 1875, and consisted of nine members. 'In April, 1884, an election by the ratepayers took place, to fill up the vacancies occasioned by three members retiring in rotation. The retiring members were not re-elected, but three fresh persons were at the head of the poll. One of these turned out to be disqualified, which brought in one of the retiring members, who was next on the poll. On the 1st of May the old members, including the re-elected one, resigned, leaving only the two fresh members. These two, on the 29th of May, proceeded under Sched. II., Part I., rule 65, to elect three fresh members, and at an adjourned meeting on the same day the five elected four more, thus making up the full number of nine.

The Act contains the following provisions on the subject: Sched. I., rule 2: "No business shall be transacted at any such meeting unless at least one third of the full number of members be present thereat, subject to this qualification, that in no case shall a larger quorum than seven members be required."

Rule 9: "The proceedings of a local board shall not be invalidated by any vacancy or vacancies among their members, or by any defect in the election of such board, or in the election or selection or qualification of any members thereof."

Sched. II., Part I., rule 65: "Any casual vacancy occurring by death resignation disqualification failure duly to elect members or otherwise in a local board shall be filled up by the local board out of qualified persons within six weeks or within such further period as the Local Government Board may by order allow. . . ."

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Sched. II., Part II., rule 2: "In the case of any lapse of a local board the owners and ratepayers may . . . proceed to the election of a new local board in manner provided by this schedule," &c.

In August, 1884, the Defendants, the School Board of *Newhaven* laid before the Local Board plans for the erection of a new building to be used as a girls' and infants' school, in lieu of an old infant's school which the school board proposed to pull down. They fronted upon a narrow passage called *South Lane*. Within a month, the local board rejected the plans, and requested a conference upon them. In October they were laid before the local board again with some modifications. The plans shewed a main building with annexes for lobbies, lavatories, &c., in front of it, reaching to the edge of the Defendants' land. On the 13th of November they were returned to the school board with a letter stating that they were not approved of, because they did not comply with by-laws 4, 5, and 6, of the local board. These by-laws were as follows: "(4.) Every person who shall lay out a new street which shall be intended for use as a carriage road shall so lay out such street that the width thereof shall be thirty-six feet at the least; (5.) Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage road, and shall as regards such street comply with the requirements of every by-law relating to a new street intended for use as a carriage road; (6.) Every person who shall lay out a new street, which shall be intended for use otherwise than as a carriage road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be twenty-four feet at the least." It was now admitted that this reason was an invalid one, since *South Lane* was not a new street. On the 31st of December the builder of the school board sent in a notice to the local board stating that he was instructed to commence the building not later than the 5th of January. On the 2nd of January the clerk of the local board replied that no plans were lodged with him. On the 5th of January the school board began to pull down the old school, and on the 6th they forwarded their plans to the local board. By the 12th of January they had begun to lay the foundations of the new building.

On the 22nd of January, 1885, an extraordinary meeting of the

local board was held, at which it was resolved that notice should be given to the school board prescribing the building line in *South Lane*, and requiring them to set back their buildings six feet from the edge of their land. On the following day the clerk of the local board sent to the school board a letter informing them that the local board did not object to the plans, but that they had prescribed the building line in *South Lane*, and required the school board to set back their buildings six feet or thereabouts from the boundary of their land, viz., up to the line of the main wall of their building, as shewn upon the plans. He went on to say that the local board were willing to pay compensation for any loss or damage sustained in consequence of the buildings being set back. He added that, while the local board felt the necessity of widening *South Lane*, they had a strong desire to save the school board trouble and expense, and had therefore so prescribed the building line that the main wall of the building should not necessarily be altered, and if it were not altered, the school board, in order to keep within the building line, would only have to provide other accommodation than was shewn in the plans for lobbies, lavatory, &c., for which their ground afforded ample space.

At this time some progress had been made in the erection of the main wall towards *South Street*, but nothing had been done towards erecting the lobbies, lavatory, &c., in front of it.

On the 29th of January the clerk of the school board wrote to ask for a plan shewing the proposed building line, adding: "The board does not admit your right to define the building line, but is prepared to consider your proposal without prejudice." On the 11th of February the local board, at a meeting, agreed to offer £40 as compensation for setting the buildings back, and their clerk, on the next day, wrote to the school board offering this sum.

In April, 1885, three members of the local board retired, and three persons were elected by the ratepayers to fill up the vacancies.

No answer to the offer of the 11th of February having ever been received, the clerk of the local board, on the 1st of May, made a tender of £40 to the clerk of the school board, which he

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

declined to receive. On the 15th of May the clerk of the local board wrote to the clerk of the school board stating that according to the report of the surveyor the new buildings were being erected so as to transgress the building line prescribed on the 22nd of January, and that the local board required the school board to desist from any erections upon the land within the building line, and to remove any such erections as might already have been placed upon it. On the 19th a similar letter was sent, but the school board proceeding with their operations, the local board commenced this action on the 21st, and on the following day gave notice of motion that the Defendants might be restrained from rebuilding their schools so far as they fronted *South Lane*, in such a manner as to contravene or extend beyond the building line prescribed by the Plaintiffs, and might be ordered to pull down and remove any walls, erections, foundations, or works which had been already begun or erected by them beyond the building line.

On the 12th of June, 1885, the Plaintiffs moved for an injunction.

Cozens-Hardy, Q.C. (*Ashton Cross* with him), for the Defendant board, took the objection that the board had lapsed at the time the building line was said to have been prescribed.

Cookson, Q.C., and *Corrie Grant*, for the Plaintiffs:—

The election of members under rule 65 of the second schedule to the *Public Health Act* to fill casual vacancies is not business within the meaning of rule 2 of Schedule I. of the Act. It is intended that so long as there is any member left the board shall be able to fill up their number.

If, however, the election of members was not valid, they acted as such, and any defect in their election is cured, for the purpose of things *bonâ fide* done by them, by rule 9 of Schedule I.

PEARSON, J.:—

By the resignation of seven members the board became reduced to that extent that it was impossible to form a *quorum* under rule 2 of the first schedule to the *Public Health Act*, 1875, and the two members left were unable to transact any business.

C. A.
1885
NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.
Pearson, J.

It is said that although they were unable to transact business, nevertheless they had power to elect new members, inasmuch as, in case of casual vacancies, the vacancies are to be filled up by the board itself. I am of opinion that the election of members is as much business as any other matter to be transacted by the board; and, if four members of the board had remained, I should have come to the conclusion that the presence of three members would have been necessary to fill up the vacancies. I come to the like conclusion that inasmuch as there were only two members left the board could transact no business at all, and the question is whether the proceedings of the 29th of May were not absolutely null and void. It is said that the proceedings were good because the 9th rule of the first schedule of the *Public Health Act* provides "the proceedings of a local board shall not be invalidated by any vacancy or vacancies among their members, or by any defect in the election of such board, or in the election or selection or qualification of any members thereof." This does come within the words of the rule relating to "any defect in the election of such board;" but I conceive that applies to any defect in an election, when there is an election. But the question is whether there was any board on the 29th of May; I am of opinion that there was no board. I consider that, under the circumstances of the case, the board had lapsed, the board could do no business of any sort or description and could not add to its number so as to construct a board. I think, there being no board, the board could not prescribe a building line at all, because the board had lapsed altogether, and the proper course would have been to have had an entirely new board elected under rule 2 of the second part of the second schedule to the Act. The motion therefore will be refused with costs.

D. P.

C. A.

The Plaintiffs appealed, and the appeal was heard on the 15th and 16th of July, 1885.

Cookson, Q.C., and *Corrie Grant*, for the Appellants:—

We contend that Mr. Justice *Pearson* was wrong in allowing the preliminary objection. Schedule II., Part I., rule 65, gives

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

the board power to fill up casual vacancies. Schedule I. rule 2, provides that no business shall be transacted at a meeting unless at least one-third of the full number of members be present thereat. Then by Schedule I., rule 9, the proceedings of a local board are not to be invalidated by any vacancy or vacancies among their members, nor by any defect in the election or selection of any member of it. It can hardly be intended that the action of the board should be wholly paralyzed by the resignation of seven members out of nine.

[LINDLEY, L.J.:—Suppose all the members resigned.]

Then Schedule II., Part II., would come in, as the board would clearly have come to an end; but in the present case there was a board, though not a full one. We contend that Schedule I., rule 2, does not hit this case, for that this is not "business" within the meaning of the rule.

[COTTON, L.J.:—*Primâ facie*, whatever the board do in their official capacity is business.]

Yes; but this rule must be read in connection with the rule as to filling up casual vacancies, and "business" ought to be read as meaning the work which the board has to do under the Act. Filling up vacancies to enable the board to proceed to business is not business. But if the Court is against us on that point, we say that Schedule I., rule 9, cures the deficiency. Mr. Justice *Pearson* thought that the rule assumes the existence of a board, and that here there was no board; but if in order to make rule 9 apply there must be a complete board, the rule is unnecessary and useless. Schedule II., Part I., rule 70, shews that it was the object of the Act to make the acts of a *de facto* board valid whatever irregularities there might be in the election of the members. The board, therefore, though some of its members might not be duly elected, could effectually prescribe a building line.

Cozens-Hardy, Q.C., and *Ashton Cross*, *contrà*:—

[COTTON, L.J.:—We do not wish to hear you on the question whether filling up vacancies was "business."]

Then as to effect of rule 9, it is true that in one sense the corporation exists, but if there is such a failure of members that the

board cannot act, then it is for all practical purposes at an end. The argument of the other side must go to this, that if all the members resigned, and the office boy went in and elected himself and eight others, these nine could act as a board.

[COTTON, L.J.:—That is a case of a mere stranger coming in.]

He is in as good a position as corporators who cannot do anything.

[COTTON, L.J.:—That is taking a long step. Are the public to be left without protection because there has been an irregularity in the election?]

There are ample provisions for the protection of the public in Schedule II., Part II. It would be a very inconvenient construction to allow a single remaining member of a board to fill up the vacancies. Mr. Justice *Pearson* during the argument put the case of a member making himself so disagreeable that the others all resigned. He then elects eight members to fill up the vacancies, who might be persons most unacceptable to the ratepayers. The cases under the *Companies Act*, 1862, sect. 67, furnish an analogy; they shew that an outsider who knows nothing of the irregularity is safe in dealing with a board of directors however irregularly appointed, but that the case is different where the irregularly elected board seeks to impose a liability on others, as, *e.g.*, by forfeiting shares. So here a contractor would have a good claim against the board, but the case of seeking to impose a liability on outsiders apart from contract is quite another matter.

Cookson, in reply:—

[COTTON, L.J. The question you have to consider is whether rule 9 enables the board to insist on the validity of its acts though it depends on an election by persons who had no power to do business.]

It is the scheme of the Act that we should do so. We have no personal interest, and are in office to protect the ratepayers. The Act, Schedule II., Part I., rule 70, fines a man for acting without qualification, but makes his acts valid. The Respondents wish to introduce into rule 9 a proviso, "provided there be present a quorum of duly qualified members."

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

[The Court held that the preliminary objection could not be sustained, and that the case must proceed on the merits.]

Cookson, Q.C., and *Corrie Grant*, for the Plaintiffs:—

We rely on sect. 155 of the Act. It has been alleged by the Defendants that the prescribing a building line is unnecessary and vexatious, and has not been done in good faith. The local board *bonâ fide* wishes to widen *South Lane*, and is acting within its powers in fixing a building line; even supposing the building line not to have originally been well prescribed, it has been adopted by the new board, which indisputably has been well elected.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the Defendants:—

We say that the local board cannot at the same time approve plans, and lay down a building line which cuts through the buildings shewn upon them.

[COTTON, L.J.:—I do not see any inconsistency in that, as you have ground enough to enable you to set your buildings back.]

Then again, we say that the local board, not having validly objected to our plans within a month, as required by sect. 158, cannot prevent our building according to them: *Masters* v. *Pontypool Local Government Board* (1). They did it is true object to the plans within a month, but only on a ground which is manifestly wrong, so it is as if they had never objected at all.

[COTTON, L.J.:—The case to which you refer seems to me to go on the principle that a board after approving of a plan and leading the landowner to build in the belief that his building on the lines there laid down is assented to, cannot afterwards lay down a building line which interferes with them.]

The case we submit does not go only on that, but justifies the proposition for which we contend. The Plaintiffs cannot lay down a building line so as to interfere with buildings which have been begun, without any valid disapproval of the plans, and the plans shewed them a building with annexes, so that the work must all be treated as work begun before the building line was prescribed. Sect. 155 by its terms only applies where the building has not been commenced when the line is laid down.

(1) 9 Ch. D. 677.

[COTTON, L.J.:—Has it been decided that annexes must be within the building line?]

We cannot contend the contrary, though it would be our interest to do so. It has been discussed whether a boundary wall need be, but annexes are part of the building. Mr. *Cookson* has started a new point, that a validly erected board has adopted the building line prescribed by the irregularly elected board, but in that case the building line was only validly prescribed in April, and could not be laid down in contravention of plans on which we had been building ever since January. But as to the election in last April, we say that it does not improve the Plaintiffs' case. The irregularly elected board could not take the requisite steps for an election. By Schedule II. Part I., rule 32, the chairman of the board is the returning officer. Now, if there was no validly constituted board, there could be no chairman. If there was no chairman then it was necessary to proceed under rule 33, so there were steps to be taken which could not be taken by this board of two. There was therefore nothing to be done but to proceed under the provisions as to lapse. The Plaintiffs, then, are not a duly constituted board, and have no right to sue as such.

[LINDLEY, L.J.:—You have been dealing with them as the local board for months. Can you now turn round and say they are not the board?

COTTON, L.J.:—It seems to me that you have misled them. If you had said at once, "you are not a legal board," proceedings might have been taken under the provisions as to lapse.]

The plans have never been disapproved of within the meaning of the Act, since they were only disapproved of for an invalid reason, and by a board not duly constituted. We are in the same position as the plaintiff in *Slee* v. *Corporation of Bradford* (1).

[COTTON, L.J.:—There the plans had been approved of, here they had not.]

The plaintiffs here are too late, as in *Corporation of Folkestone* v. *Woodward* (2).

[*Cookson*, Q.C.:—The Act there was in different terms.]

(1) 4 Giff. 262.

(2) Law Rep. 15 Eq. 159.

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

The terms of sect. 155 do not authorize the laying down a building line which will interfere with buildings then commenced.

Cookson, in reply:—

The cases referred to are only instances of the application of the general rule as to lying by and allowing persons to incur expense under a mistake. Sect. 155 does not give the board authority to prescribe a line till the building has been pulled down. It is unreasonable in any one to begin building at once without waiting a reasonable time to see whether a building line would be prescribed. The notices given to the Defendants, though invalid, gave the Defendants full information that we wanted to widen *South Lane*, and they had, therefore, reason to expect that a building line would be prescribed. As regards the present construction of the board, and the argument that the election in April last does not improve it, however narrow a construction be put upon rule 9, it must cover such an insignificant matter of form as that the ratepayers were not summoned by a person duly authorized.

[At the close of the argument the Court asked whether both parties would agree to treat this as the trial of the action. They both assented.]

COTTON, L.J.:—

This is an appeal from the decision of Mr. Justice *Pearson*, who did not enter into the merits of the case, but decided that the defects in the constitution of the Plaintiff board were an answer to the action.

The parties, after the argument, and before we had intimated any opinion, agreed that this should be treated as the hearing of the action, and of course the judgment which we make must be prefaced by a statement of that consent of the parties.

The Plaintiffs claim to be the local board of the district of *Newhaven*, and the Defendants are admittedly the school board for the same district. What the Defendants are proposing to do is to erect a school building, but part of the building which they

propose to erect and which, to some extent they have erected, is beyond the line which the Plaintiffs have purported to prescribe under sect. 155 of the *Public Health Act*, 1875, and this action was instituted in order to prevent the Defendants from making their building project beyond that line. As part of it has been put up beyond that line, of course the judgment, if it is in favour of the Plaintiffs, will necessitate the pulling down of part of the building. The part of the building in question is only some annexes consisting of lavatories, lobbies, and other similar places.

In January, 1885, a resolution was passed fixing a building line which would prevent any portion of the school building from projecting beyond the main wall of the building. If, therefore, that building line was well prescribed, the Defendants are in the wrong. But various objections were taken to the right of the Plaintiffs to sue, and the objection which alone Mr. Justice *Pearson* considered, the case being only before him on an application for an interlocutory injunction, was this, that at the time when the building line purported to be prescribed by the Plaintiffs, there were no persons, no corporators, capable of acting and giving any direction on behalf of the local board, and on that ground he refused to make any order.

The first matter to be considered is whether that objection is well founded. This local board was to consist of nine members. The schedules to the *Public Health Act*, 1875, provide (Sched. I., rule 2), that no business shall be transacted at any meeting unless at least one-third of the full number of members is present. There was hardly any discussion about the meaning of that rule. I think it was conceded that the true construction is, what in my opinion it is, that the quorum shall be one-third of the prescribed number who are to constitute the board, and that would be in this case three.

Shortly after the election of some new members of the board, seven of the persons who in consequence of that election would have constituted the board, resigned and left two only to be the board. Sched. II., Part I., rule 65, provides that when there is a vacancy between the periods of the annual elections, the board shall select or elect a sufficient number of persons duly qualified to make up the number of the board, and these two members

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Cotton, L.J.

purported to act under that power, and took to themselves seven other persons to make up the number of nine. The objection was, that no business could be done at all by the board, there being only two persons duly elected as members, and that the taking or selection of these seven persons was "business" within the meaning of Sched. I., rule 2, and that the election of the seven was void.

The first point to be considered is this, whether the taking additional members comes within the 2nd rule of Sched. I.: "No business shall be transacted at any such meeting unless at least one-third of the full number of members shall be present thereat." Now was this "business?" In my opinion it was. It is very true it is not the business which a full board has to transact, but it was business of the board to be done for the purpose of filling up the vacancies so as to constitute the board with the proper number. So, in my opinion, if rule 2 was the only rule which we had to regard, this objection would be fatal to the Plaintiffs' case.

But we must look at the other rules, and we have to consider whether rule 9 does not apply. That rule is as follows: "The proceedings of a local board shall not be invalidated by any vacancy or vacancies among their numbers." In my opinion, that part of the rule was intended to provide that a quorum might act although the number of members of the board was reduced below the defined or required number. Then it goes on: "or by any defect in the election of such board." That, I think, does not apply to this case; it seems to refer to the election of the board as a whole. But then we come to this: "or in the election or selection or qualification of any members thereof." Now, as I understand, Mr. Justice *Pearson* seems to have come to the conclusion that this does not help the Plaintiffs because "thereof" means "of the board," that there was no board here; and that therefore this rule did not apply. I cannot agree with that. We talk of the board in two senses. The local board is a corporation; it is incorporated under the Act, but from the imperfection of language we use the word "board," not only to describe the corporation, but to describe the persons, the corporators, who are acting in the exercise of the powers given to the board, and, in my

opinion, "board" here must mean the corporation. Although the number of the members of the corporation was reduced to two, yet the corporation had not come to an end; it still existed, though it existed in such a state that, having regard to rule 2, there were not sufficient members duly appointed to deal with the matters which might have to be dealt with. In my opinion, therefore, as regards the validity of the acts done by the board, rule 9 cures the defect arising from the fact that the persons elected or selected to fill up the vacancies were chosen by two persons who, not being a quorum, were not competent to fill up the vacancies. Therefore, in my opinion, we cannot consider what had been done by the board, although irregularly constituted, as being ineffectual.

Let us consider what is the object of the 9th rule. At first one is inclined to think that it was only intended for the protection of those who deal with the board, but, in my opinion, if we look carefully at it, we shall see that it goes much further, and that there is good reason for its doing so. When these local boards are once constituted they have to regulate various things in the districts for which they are appointed, and it appears to me that the rule was intended to prevent the consequences which would arise, if the proceedings of a board regulating and giving directions as to what is to be done in the district as to various important matters, could be impeached as done without authority because the board was irregularly constituted. It would throw a district into confusion if, when steps had been taken by a quorum of the persons acting as a board, the objection could afterwards be taken that the election of certain members was wrong, and that there was not in fact a duly qualified board. We may take this case as an example of the results. I do not like to construe Acts of Parliament by the result of one construction or the other, but we cannot wholly disregard the consideration in what a state this place would be, if all the acts which have been done for a year by the persons who were acting as the board, were to be held inoperative because there was this defect in the filling up the vacancies. I do not at all think that if two members purported to pass resolutions in exercise of the powers given to the board the defect would be cured by rule 9, for only the statutory quorum can do business, but, in my opinion, where a proper quorum of the

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Cotton, L.J.

persons acting *de facto* as members of the board passes resolutions, rule 9 does prevent any objection being taken to those resolutions, or to the action which they take in consequence of them, on the ground that if the matter was investigated it would turn out that the election of some of the members of the board was not in law a good election. In my opinion, therefore, the acts of the board, though irregularly constituted, must be taken as good acts, for the board here are not appearing as individuals, but as a corporation acting for the benefit of all the inhabitants in the district of *Newhaven*.

Then we come to the merits, into which Mr. Justice *Pearson* did not enter. It appears that the school board determined to pull down an old school and build a new one, and in August, 1884, they sent plans to the local board as then constituted and purporting to act. Objections were taken to those plans. In October further plans were sent in and objections were taken to them. Those objections were founded on this: that the board as then advised considered that the plans were in violation of 4, 5, and 6 of their by-laws. It is not immaterial that those by-laws, to which the local board referred on the footing of this being a new street (which it was not), require that the new street should be of a certain width.

The school board were advised some time early in January, if not before, that the reasons given for these objections to the plans were not good reasons, and that this not being a new street, the powers of sect. 158 could not be applied by the local board if the school board went on notwithstanding the objection to the plans. And so, apparently, on the 5th of January they began to pull down the building for the purpose of re-constructing it. Then on the 6th of January they seem to have sent to the Plaintiffs plans substantially the same, if not in all respects the same, as those which had been sent in October. After this they went on with their building in such a way that on the 12th of January they had begun to lay the foundations of the new building. On the 22nd of January the Plaintiffs, the local board, passed a resolution defining under sect. 155 the building line, which was so laid down that although the main building of the school would be within it, the annexes, the lavatories, &c., which I have

mentioned would project beyond it. Those annexes, however, had not at that time been begun. The question is, can the Plaintiffs insist upon their objection and ask the Court to give effect to it?

It was said first of all, although it was not much argued, that sect. 155 does not in such a case give power to the board to lay down a building line. Sect. 155 is as follows: "When any house or building situate in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith." As I understand the objection, which was not much urged, it was this: that the house or building had in fact been commenced before the Plaintiff board purported to prescribe the building line, and that therefore there was not under the Act of Parliament any power of prescribing it. In my opinion that objection cannot prevail. If that part of the building, which, as it was planned, would interfere with the building line, had been substantially begun, probably there would have been no power under this section to prescribe a line which would interfere with it; but here it was not so. On the 22nd of January nothing had been begun which went beyond the line then fixed, and that being so, it would, in my opinion, be wrong to say that the power given by this section is gone. Is it gone as regards prescribing the line of the front, because a man has begun to build his back buildings? In my opinion that cannot be so. In my judgment where a building is taken down for the purpose of being re-built, the line of any portion of that building may be prescribed before that portion is commenced, unless what has already been done necessarily involves as a matter of construction a projection beyond that which the local board may afterwards determine to be the proper line. It was said that the Plaintiffs knew from these plans that what was being done by the Defendants was the commencement of a building to which they intended to have an addition which would go beyond the line which the Plaintiffs prescribed, but that to my mind, where the addition is not necessarily incident to the structure

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Cotton, L.J.

already begun, is not an argument for saying that the power given by the Act is gone, but merely an argument in equity to shew that there are equitable circumstances which prevent the local board from exercising the power.

The substantial question to my mind is this—whether the circumstances are such as to raise an equity preventing the Plaintiffs from prescribing a line which prevents the completion of the building in accordance with the plans according to which the Defendants intended to build, and which had already been laid before the Plaintiff board.

That is a matter of considerable nicety. It was argued that because the objections given by the Plaintiffs were inoperative under sect. 158, therefore the Plaintiffs had lost their right to interfere in another way with the completion of the plans which had been laid before them. I think that we have nothing to do with sect. 158; the question is whether what was done by the Plaintiffs led the Defendants reasonably to suppose that there would be no objection to any portion of their new building coming beyond the line which had been laid down by the Plaintiffs. It would of course be contrary to equity to allow the Plaintiffs, though a public body, to claim an injunction against the Defendants, if the Defendants had incurred expense in consequence of acts of the Plaintiffs which led them reasonably to believe that the plans, so far as frontage went, would not be objected to.

But how is that made out? The objections of the Plaintiffs to the plans went on wrong grounds. They objected twice, and on the second occasion gave a reason, viz., that the proposed buildings violated certain by-laws. They were by-laws which, assuming this to be a new street, would require that the width of it would be such that these annexes could not be constructed. This was not a new street, and the objection, therefore, was put on a wrong ground; but it was an objection amounting to this: "We, the local board, require that your buildings shall not extend so far towards *South Lane* as you propose." How, then, can it be said that the Defendants have been in any way misled by the conduct of the local board? It is true that the local board gave a wrong ground as that which would enable them to insist on the widening

of the space between the buildings of the Defendants and the other side of the road, but they pointed out, although on a wrong legal ground, that they desired to have the buildings thrown back further than was shewn on the plan. In my opinion, therefore, it cannot be said that the Defendants were in any way misled by the conduct of the Plaintiffs into assuming that the Plaintiffs would not raise any objection on the ground that they were going to prescribe the line. The Plaintiffs were advised after a time that the by-laws would not help them, and when so advised they took the course of acting under sect. 155, and as, in my opinion, the Defendants cannot say they were misled or induced to act as they have done by any belief caused by the action of the Plaintiffs, that the Plaintiffs did not object to the side of those buildings in question projecting as far as it would do if the Defendants carried out their plans, I think that no equity arises against the Plaintiffs.

The cases which were referred to, and which seem to me to have little bearing upon the present, were either cases of approval of plans given, or of no dissent to plans that had been given. The Court held that under those circumstances the defendants were justified in coming to the conclusion that the board did not object to the line of frontage as shewn by those plans, and that, therefore, they could not exercise the powers given by sect. 155. But that has no bearing on a case where the Plaintiffs stated their objection to the projection of the building beyond the line upon which they now insist, although they objected on grounds which they could not legally enforce. In my opinion, therefore, it cannot be said here that the Plaintiffs, having the legal power to prescribe a line beyond which the buildings should not go, have by their conduct given any equity to the Defendants to insist that they shall not exercise that power.

Judgment, therefore, must be given to pull down these annexes, which, as I understand, have been put up and completed. I should add that in my opinion the result would have been different, if the completion of these annexes in the position shewn by the plans were essentially necessary to the completion of the building which had been begun before the line was prescribed; but it is sworn to, and on looking to the plans one cannot doubt

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Cotton, L.J.

the accuracy of the statement, that although it may cause some inconvenience and a little expense, the school can without difficulty be provided with the conveniences which were intended to be provided for by these annexes, although in a different place.

Then we come to the question of costs, which may be an important one and an unfortunate one for the ratepayers in this place. As the Plaintiffs succeed they must have their costs from the Defendants. That may or may not throw upon the ratepayers, whom both parties represent, the costs of these proceedings. I do not think we are in a position to say whether that ought to be so or not, but I cannot but look upon this litigation as a most unfortunate one, and one caused by conduct on the part of the school board or their advisers which cannot be justified. And if there is any one who has a control over the expenditure of the school board in reference to such proceedings as these, so as to disallow them as against the ratepayers, I hope they will consider how far the costs of this litigation are costs which ought to be raised at the expense of the ratepayers. I give no opinion upon the question, as it does not come within our jurisdiction; but if there is an authority which can consider such a question, I hope it will be duly considered by that authority before the expense of this most unnecessary litigation is thrown upon the ratepayers.

LINDLEY, L.J.:—

I also am of opinion that the school board in this case are entirely wrong, and have been wrong from the beginning to the end.

The object of this litigation is to compel the school board to pull down certain portions of their buildings which project beyond a building line which was fixed, rightly or wrongly, *de facto* on the 22nd of January, 1885. There is no doubt that the line was fixed, and I will consider presently whether validly fixed, and there is no doubt that portions of the school project beyond that line. These facts being beyond controversy, the points which require consideration are these. First of all, was that line fixed by proper authority? Secondly, was it fixed in sufficient time?

Thirdly, supposing it was fixed by proper authority and in sufficient time, were the Defendants misled by the Plaintiffs in such a way as to render it inequitable for the Plaintiffs to insist upon the pulling down of these buildings? and, lastly, there is the point whether the present Plaintiffs can sue, supposing that the old board could not.

As regards the authority by which that line was fixed, the case stands in this way:—In April, 1884, there was a local board properly constituted consisting of nine members. That being the full number, three are a quorum. It seems that in May, 1884, the board being properly constituted, seven resigned, leaving only two. Those two, on the 29th of May, appointed three others, and those three others, with the two who appointed them, appointed four others, making a total of nine. The building line, to which I have referred, was prescribed by the local board thus constituted, and it is said that inasmuch as two were less than a quorum, the appointment by them of three additional members was wrong and invalid and good for nothing, that the appointment by those five of the additional four was equally invalid, and that there was not, when the building line was prescribed, any quorum of the board capable of prescribing it. There is, no doubt, a difficulty upon that point, a difficulty which, as it strikes me, it is in the highest degree unbecoming on the part of the school board to raise, because with the full knowledge of all the facts they have been negotiating with the local board upon the footing that that local board was properly constituted. But I pass that over, as it cannot deprive the school board of the legal right to take the objection, however ungracious taking it may be. But is the objection valid? It appears to me that rule 9 in schedule I. applies to a case of this kind. The words are very wide: "The proceedings of a local board shall not be invalidated by any vacancy or vacancies among their members, or by any defect in the election of such board, or in the election or selection or qualification of any members thereof." Now what is the object of such a rule as this? It is obviously to prevent such objections as are raised in this case. It only becomes useful in cases where there are defects in the election or selection or qualification of any members of the board, and it appears to me to render valid the

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Lindley, L.J.

proceedings of the local board in all dealings between the local board on the one side, and persons dealing with them on the other, subject to this, that I doubt whether it applies as between the local board and the members who are improperly appointed. I mean to say that though it is worded widely, I doubt whether it would be an answer to a *quo warranto*. But in all dealings between the board and other people, it appears to me that the proceedings of the board are rendered valid. I was very much struck by the argument of Mr. *Cozens-Hardy*, that the object of this rule was to protect people dealing *bonâ fide* with the local board without notice of irregularity. Of course it was intended to provide for such a case, but the question is whether it is confined to such cases? I do not think that it is; it appears to me to render the acts of a board valid notwithstanding any defect in the election of any of its members. I think, therefore, that whatever irregularity there was in the constitution of the board in May, 1884, this rule would make the election of the three who were elected in 1885 perfectly valid. It appears to me to extend not only to protect people dealing *bonâ fide* with the board without knowledge of the disqualification, but also to protect the ratepayers, whose guardians and trustees the local board are. I therefore come to the conclusion that fixing the building line was a proceeding which is rendered valid by rule 9.

Then we come to the next question, whether that building line was fixed within the proper time? That depends upon the true construction of sect. 155, and I quite agree with the view taken and expressed by Lord Justice *Cotton*, that the building line must be fixed before the new building is erected, and it must be fixed, as far as I can judge, before any substantial part of that new building which transgresses the line is put up. If then, the main wall of these buildings had, before the building line was fixed, been put up so as to project beyond the building line, I should say that on the true construction of sect. 155 the building line was fixed too late. But the main wall of this building did not project beyond the building line, and the parts which do project had not been begun. It appears to me, therefore, that, looking at the strict legal rights of the parties, the building line was prescribed in due time.

But that does not quite exhaust the case, because the Defendants may have been induced by the Plaintiffs to commence their building and put up the main wall of it in the belief that they would be allowed to complete their building according to the plan which was communicated to the Plaintiffs; and if that were so, the Plaintiffs could not claim an injunction. It therefore becomes necessary to consider whether any such defence as that is open to the Defendants, and after looking at the correspondence and at what was done, it appears to me that no such defence is open to them. From August, 1884, to January, 1885, there had been communications between the local board and the school board about these new schools. Plans had been sent in as early as August by the school board for the approval of the local board. Those plans were objected to, I care not for the moment why. Some new plans were sent in in October, they were again objected to; it is said, and said truly, that they were objected to for invalid reasons. But when we come to look closely to see what these two bodies were negotiating and disputing about, I find that it is this. The local board were struggling to get a wider street, they objected to the plans which were sent in in October, on the ground that the schools did not admit of this street being so wide as they wished. They were under the erroneous impression that they could validly object to the position of the school under certain by-laws, but the substance was that they were struggling for a wider street, and this the school board perfectly well knew. The school board were advised that the objections taken to their plans were based upon by-laws which did not apply, and that the objections were invalid. But when we come to consider whether they were misled by the Plaintiffs, it appears to me obvious that they were not misled at all, but knew perfectly well that the Plaintiffs were struggling to get these schools set back, and would, if they could, compel them to be put further back. Knowing that, and without waiting for any reasonable time to ascertain the view which the Plaintiffs would take, the Defendants put in the foundations of their main wall, and commenced building. That being so, it is impossible, it appears to me, for them to say with the slightest truth that they were misled in any way by the Plaintiffs. On the contrary, I think that they were trying to go on building until

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

Lindley, L.J.

it was too late for the Plaintiffs to obtain an injunction. That disposes of one of the important points in the case.

I pass to the only other point, which is quite a subordinate one. It struck me at one time that although rule 9 would validate the acts of the old board, at the same time the Defendants might say to them, "Suppose we cannot dispute your building line, still you are not able to enforce it, for you are not a duly constituted board." It struck me at first that this was rather a formidable objection, but it appears to be entirely got rid of when we know that in April of this year a fresh election took place, and that we are now dealing not with the persons who, though not duly constituted, fixed this building line, but with a board which has a quorum of three, the propriety of whose election it appears to me, having regard to the operation of rule 9, cannot now be questioned. Whatever doubt there may be about the operation of rule 9 on the old board, I cannot conceive that it does not validate the election of those three persons appointed at the subsequent date.

It appears to me, therefore, that every ground relied upon by the Defendants fails. They have been wrong from the very beginning, and I regret that the costs of this litigation may fall upon persons who ought not to bear it, I mean the unfortunate ratepayers.

BOWEN, L.J.:—

The first question to which I propose to address myself is the question which was decided by Mr. Justice *Pearson*. Was there here a defect in the constitution of the board, advantage of which defect can be taken by the Defendants?

Here was a board of nine with a statutory quorum of three. Seven resigned, leaving less than the statutory quorum. Now the statutory quorum is settled by rule 2, which says that "No business shall be transacted at any such meeting unless at least one-third of the full number of members be present thereat." The two nevertheless who were left out of the nine, proceeded to elect others in the place of the seven who had disappeared. We have at the outset to consider whether that was a valid act or not. I think it is pretty clear that it was not a valid act, because

the election of members in the place of those who went out was business of a most important kind. If that is not "business to be transacted" I do not know what it would be, or how you would describe it on the agenda paper. But supposing the act to be invalid, then comes the question, whether it is validated by Sched. I., rule 9, which says that the proceedings of a local board shall not be invalidated by any defect in the election or selection of any members thereof. The Plaintiffs contend that though this was a proceeding which was not regular, nevertheless the fixing the building line was a proceeding of the local board which, if invalid, was only invalidated by reason of a flaw in the selection of the members, and that therefore it is validated by the rule. Mr. Justice *Pearson* has not accepted that view, and the whole of his judgment depends upon this proposition—that there was no local board at all, that rule 9 of Sched. I. only applies to proceedings of the local board, and if there is no local board then, of course there are no proceedings to which it can be applied.

Now was there any local board at the time when the building line was purported to be fixed? This seems to me to be a most difficult question of construction. A local board, by sect. 4 of the *Public Health Act*, 1875, is defined to be a board constituted either under the previous *Local Government Acts* or in pursuance of this Act. Then sect. 7 incorporates the local board so constituted, and makes it a corporation with perpetual succession and a common seal. But the draughtsman of the Act seems not to have fixed his attention on the way in which he should deal with the possible question of dissolution of the local board. At common law a corporation could be dissolved either by loss of all its members, or by loss of a material part of them where there was no power of renewal. It has been said, although it is not necessary to discuss the question, that a parliamentary corporation may be dissolved and vanish into thin air. The only case I have been able to discover where the question has been at all ventilated is *Rex* v. *Helleston* (1). But no absolute rule can be laid down in the case of statutory corporations, their incidents

(1) 2 Douglas Election Cases, 1.

C. A. 1885

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD.

BOWEN, L.J.

must depend on the statutes which form them, and in the present case we must consider, upon the terms of the Act, under what circumstances a local board ceases to exist.

Turning to Sched. II., Part II., which deals with lapses of local boards, the puzzling thing is that it does not speak of the dissolution of the local board, but talks of the "lapse" of a local board, which is an ambiguous word, and may mean the lapse of all the powers of the local board, or may mean the cessation of corporate members without extinction of the corporation, or may be used in a popular sense as denoting extinction of the corporation itself. And when you come to consider the language of Sched. II., Part II., rule 2, which talks of the powers, rights, duties, property and liabilities of the lapsed board attaching to the new board, that is a provision for devolution of property from a body which by sect. 7 of the Act has perpetual succession. It is a most difficult question to my mind, whether in this particular instance there has been a lapse, or if there has been a lapse, what it is. I cannot say more than that, on considering it to the best of my ability, I am not satisfied, and the statute has certainly not made it clear, that if the number is below a quorum, the corporate body is to be taken to be extinct, so that there is no longer a local board. Supposing that there was a local board still existing, and that the whole board had been re-elected by the ratepayers, they would be a duly constituted board, and the invalidity of their proceeding in fixing a building line could only arise from the two having selected members when they had no power to do it, so that the members selected were not properly selected. If that is so, I think that sub-sect. 9 cures the defect, assuming, as I do, that the statute does not make it clear that there is a dissolution of the corporate body and a vanishing into space of the local board. Mr. Justice *Pearson's* judgment depends upon the assumption that there was no local board, and I am not satisfied that his assumption was correct. I am sorry not to be able to express a more confident opinion.

The preliminary objection having been disposed of, we come to the merits, and we have to consider the construction of sect. 155, and the point which has been taken by the school board, that it

was too late for the local board to complain that there was an infringement of sect. 155, even if there was such an infringement. [His Lordship here read sect. 155.]

The first observation that occurs to me is obvious, that there must be some prescribed line to be violated before there is or can be a violation of it, and that the local board cannot complain of a line being crossed which was never laid down until after the buildings had been erected. In this particular instance no part of the buildings which lie beyond the prescribed line was commenced until after the line had been prescribed.

I think, however, that upon the true construction of the section it would be too late to prescribe a line if what was already done in the way of building necessarily involved as a matter of construction the crossing of the prescribed line. But that cannot be said to be the case here, because the erection of the building, which was commenced and its foundations laid before the time when the line was prescribed, did not necessarily involve the crossing the line afterwards, though it was shewn upon the plans delivered to the local board that it was intended to erect buildings beyond the line. Upon that arises the question, whether there is any equity which prevents the local board from exercising the powers of the Act. I think that if the local board, knowing that what was intended to be done was the erection of a building which, if finished, would go beyond the line which they intended to prescribe, abstained from prescribing the line, it would be unjust to allow them to prescribe a line after standing by and letting the school board build under the impression that no line would be prescribed. The case then resolves itself into this question of fact. Have the local board by their conduct, or by their silence, given the school board grounds for thinking when they began their building that no line would be prescribed. I did not think that a clear matter until my attention was called to the notices of objection, which though bad for the purposes of sect. 158, still are part of the conduct of the parties, and must be looked at in order to see whether there is anything in the conduct of the local board which renders it unjust that sect. 155 should be insisted upon. Those notices of objection would not entitle the local board under sect. 158 to pull down the building, or to

C. A. 1885 NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD. Bowen, L.J.

enforce penalties against those who went on in defiance of them, but nevertheless they tend to throw considerable light upon what was in the mind, so to speak, of the two boards during these negotiations and down to the time when the building began. I think they shew that the school board knew, or ought to have known, or might have known, that it was the intention of the local board to resist to the utmost the erection of the buildings in such a way that the street would be narrowed by them. I do not think it can be said, therefore, that the local board gave the school board reasonable ground for thinking that no line would be prescribed.

Upon the whole I think the equity suggested fails, that the statute does apply, and that the Plaintiffs are entitled to judgment. I agree with what the Lord Justices have said as to the sad character of the case.

Solicitors for Plaintiffs: *Wood, Bird, & Wood.*
Solicitors for Defendants: *Speechly, Mumford, & Co.*

H. C. J.

C. A. 1885 *July* 23.

ASHBURY *v.* WATSON.

[1883 A. 1163.]

Limited Company—Memorandum of Association, Provisions of—Preference and Ordinary Shares—Special Resolutions altering Appropriation of Revenue, Invalidity of—Ratification by Shareholders—Rights of Shareholders under original Contract.

The memorandum of association of a company incorporated under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), stated that a portion of the shares were to have a right of receiving a dividend by preference to the other shares, and that the preference shares should have a right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and to one-fifth of the remainder of the net revenue after a deduction of a sum sufficient for paying 7 per cent. per annum on the ordinary shares; and also that those shares should have a right to the rest of the dividend, whatever it might be, up to 7 per cent. after paying 7 per cent. to the preference shares and to four-fifths of the remainder of the net revenue, after deduction of a sum sufficient to pay the dividends to the preference and ordinary shares.

The directors applied the profits of the company in substantial accordance with the provisions in the articles of association till November, 1872,

when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and which provided for the redemption of shares out of the surplus profits, and they were acted upon without any objection being raised to them by any of the members of the company till July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association was restored:—

Held (affirming the decision of *Kay*, J.), that the resolutions of 1872 were not valid, as they altered a condition in the memorandum of association in contravention of sect. 12 of the *Companies Act*, 1862:

Held, also, that even if the resolutions of 1872 would be valid if ratified by every member of the company, there was no evidence on which the Court, acting as a jury, ought to infer that every member of the company had ratified such resolutions with full knowledge of what had been done.

APPEAL of Plaintiff from judgment of Mr. Justice *Kay* (1) on a special case stated by consent for the opinion of the Court pursuant to the Rules of the Supreme Court, 1883, Order XXXIV. The material statements in the case are fully set out in the report of the case before Mr. Justice *Kay*.

Sir *F. Herschell*, Q.C., and *Robinson*, Q.C. (*F. B. Palmer* with them), for the Plaintiff:—

The shareholders had power to alter the memorandum of association so as to regulate the payment of dividends upon preference and ordinary shares. Mr. Justice *Kay* held that the resolutions of 1872 were void, and he considered that according to the decision of the House of Lords in the *Ashbury Railway Carriage and Iron Company* v. *Riche* (2), the memorandum of association was the charter of the company, and its provisions could not be departed from in any respect. But this is too wide a statement: the memorandum of association of a limited company can be altered in any respect, except as to those matters which the *Companies Act*, 1862, s. 8 (as varied by other enactments), requires to be stated therein. That section directs that the objects of the company shall be stated therein, and *Ashbury Railway Carriage and Iron Company* v. *Riche* related to a contract not within the objects of the company as stated in the memorandum of association. The constitution of companies limited by guarantee is regulated

(1) 28 Ch. D. 56. (2) Law Rep. 7 H. L. 653.

C. A. 1885 ASHBURY v. WATSON.

by sect. 9, and that of unlimited companies by sect. 10. These sections shew the distinction between different classes of companies. No doubt by sect. 11 every member is as much bound to observe the terms of the memorandum of association as if he had expressly covenanted to do so, and by sect. 12 the power to alter the memorandum of association is limited; but that section applies only to cases where the statute requires matters to be stated.

The first point, urged on behalf of the Plaintiff, is that, provided the power is properly exercised, there is nothing *ultrà vires* in an alteration of the memorandum of association except as to those provisions which are required to be therein inserted pursuant to legislative provisions. *Hutton* v. *Scarborough Cliff Hotel Company* (1) is not against the argument for the Plaintiff: for in that case the shareholders were not unanimous; and the argument for the present Plaintiff is that the memorandum of association may be altered by the unanimous vote of the shareholders.

[FRY, L.J.:—The fact that the shareholders were unanimous cannot be entered upon the register.]

The authorities are in favour of the Plaintiff: in *Duke's Case* (2) it was the opinion of *Jessel*, M.R., that the memorandum of association of a company does not bind a subscriber thereof irrevocably as regards matters not required by the *Companies Acts* to be stated therein. It was the view of that learned Judge that the memorandum of association was irrevocable only as to those matters which the Legislature said must be put into it. The opinion of *Jessel*, M.R., was approved of and followed by Mr. Justice *Fry* in *Winstone's Case* (3). The same view appears to have been in effect adopted by Lord Justice *Cotton* in *Guinness* v. *Land Corporation of Ireland* (4). The company in this case is nothing more nor less than a trading association which is governed by the ordinary rules of partnership except so far as special conditions may be inserted into their constitution by the Legislature or by their own articles of association: *Oakes* v. *Turquand* (5);

(1) 2 Dr. & Sm. 514; 4 D. J. & S. 672.
(2) 1 Ch. D. 620.
(3) 12 Ch. D. 239, 251.
(4) 22 Ch. D. 349, 376, 377.
(5) Law Rep. 2 H. L. 325.

Griffith v. *Paget* (1). There is nothing which cannot be done by the consent of all the members of the association except the alteration of those fundamental bases of the association which the Legislature has said shall not be altered. The articles of association may rebut any provisions which would flow by implication from the terms of the memorandum of association: *Harrison* v. *Mexican Railway Company* (2). Further, if the shareholders have all acquiesced in a certain course of business for ten years they cannot afterwards repudiate it, and subsequent shareholders are bound by acquiescence of their transferors: *Ffooks* v. *South Western Railway Company* (3), and *Peek* v. *Gurney* (4). The memorandum of association as altered has been acted on for many years, and cannot now be again altered without the consent of all the shareholders. Acquiescence is evidence of consent: *Phosphate of Lime Company* v. *Green* (5).

[LORD ESHER, M.R.:—There is no finding that every shareholder had notice; the argument for the Plaintiff asks us to infer it.]

The Court ought to infer that all the shareholders had notice. It is not necessary for that purpose to shew that every shareholder had actual notice: *Spackman* v. *Evans* (6).

[FRY, L.J.:—Is it not difficult to argue that the statutory transferee who gets the legal right is bound by the acquiescence of the statutory transferor? It is not a case of conflicting equities.]

Nothing prevents the statutory transferee from being bound by the acquiescence of his transferor. This is not merely a matter of special resolution; but notice was brought home to all the shareholders, and they unanimously approved of the resolutions of 1872.

Davey, Q.C., and *W. Phipson Beale*, for the Defendants, were not called upon.

(1) 5 Ch. D. 894.
(2) Law Rep. 19 Eq. 358.
(3) 1 Sm. & Giff. 142.
(4) Law Rep. 13 Eq. 79; 6 H. L. 377.
(5) Law Rep. 7 C. P. 43.
(6) Law Rep. 3 H. L. 171.

C. A. 1885 ASHBURY v. WATSON.

LORD ESHER, M.R.:—

The question of law which has been raised in this case is whether the resolutions of 1872 were valid. On the one side it is said that they were not valid, even if they were passed with the assent of every shareholder of the company, or were afterwards ratified by every such shareholder, because it is said that they were in contravention of sect. 12 of the *Companies Act*, 1862, inasmuch as they altered a condition contained in the memorandum of association. On the other side, it is admitted that the resolutions made an alteration in a condition contained in the memorandum of association, but it is said that the alteration was not as to any of the matters mentioned in sect. 8, and that therefore it was not an alteration of a condition in the memorandum of association within the meaning of the statute, and it was argued that the meaning of sect. 12 is only that those conditions in the memorandum of association as required by sect. 8 could not be altered, and that other conditions in the memorandum of association could be altered, if altered with the assent of every shareholder of the company. It was further argued against the validity of the resolutions that even if they would be binding if passed with the assent of or afterwards ratified by every member of the company, there was no evidence which ought to satisfy the Court that every member of the company did either agree to or ratify those resolutions.

It seems to me that the appellant fails on both points. As to the first point, I prefer to look at the plain words of the statute and to construe them according to the ordinary rules of construction. Now what does the 12th section of the statute say? After shewing what things in the memorandum of association may be altered, it says: "save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." Anything more plain I cannot conceive. It does not say in the conditions hereinbefore mentioned, nor in any condition necessary to the constitution of the company. It contains no limitation of any kind. To my mind it is a plain enactment that the company cannot alter anything in the memorandum of association which is a condition save

what is expressly mentioned in that section. When I consider how that section was construed by Lord *Cairns* in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), I find his Lordship says (2): "The covenant, therefore, is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions." Now anything which is laid down as a rule in the memorandum of association must, I think, be taken to be one of the conditions on which the company is established. Then the 12th section says that "no alteration shall be made by any company," that is, by the whole company, assuming that but for the enactment an alteration might be made by the whole company. Therefore it seems difficult to me to imagine a case in which any stipulation in the memorandum of association can be altered even by the whole company, save such as is expressly mentioned in the 12th section. It is said it was allowed to be done in *Duke's Case* (3). I do not, however, think that anything was said there by the late Master of the Rolls which was intended by him to assert that anything in the memorandum of association could be altered, even if there are expressions in his judgment which would seem to have that effect. I do not think that what we are now deciding is derogatory to what was decided in *Duke's Case*, but that if we were to adopt the argument of the Appellant in the present case we should be going in the teeth of the House of Lords in *Ashbury Railway Carriage and Iron Company* v. *Riche*. Therefore, even if it were shewn that every shareholder was a party to passing the resolutions of 1872, or had ratified them since, I think that nevertheless they would be invalid.

Then, as to the second point, assuming that these resolutions would be valid if they were ratified by every member of the company, it seems to me that there is no such evidence as ought to satisfy the Court that every member of the company did ratify them. Ratification consists in adopting something which has been done or assumed to have been done for the person ratifying, with full knowledge that it has been done. I doubt whether

(1) Law Rep. 7 H. L. 653. (2) Law Rep. 7 H. L. 670.
(3) 1 Ch. D. 620.

C. A. 1885 ASHBURY v. WATSON. Lord Esher, M.R.

there is any evidence which could be left to a jury of ratification with full knowledge of what had been done, but even if there be such, the Court here is to judge the fact and is to act as the jury, and certainly if I had been advising a jury to say whether they could infer that every shareholder of the company had ratified the resolutions of 1872 with full knowledge of what had been done, I should have warned them strongly to have examined their consciences closely before they came to such a decision; therefore, as far as I am concerned, I should as a juryman have absolutely refused to agree with the eleven others if they had come to a contrary conclusion.

The appeal therefore fails altogether.

BAGGALLAY, L.J.:—

I am of the same opinion. The sections of the *Companies Act*, 1862, which appear to me to have an important bearing on this case, are those ranging from 6 to 14 both inclusive. The 6th provides for the formation of a company, which may be done by subscribing to a memorandum of association. The 14th section provides for articles of association, in addition to the memorandum. The 7th section having indicated the mode by which a company may be limited, the 8th section contains the five things which must be provided for by the memorandum of association, amongst which the 5th is "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Now it has been established that it is not required that all the shares should exactly resemble each other, as far as regards the benefits to which their holders may be entitled. Then there comes the 12th section, which provides the mode in which the five things or conditions provided for by sect. 8 may be varied. In the first place, there must be authority to do it by the articles as originally framed or as altered by special resolution, for which provision is made, but all the alteration that can be made, even with that authority, is to increase the capital by the issue of new shares, or to consolidate and divide the capital into shares of larger amount than the existing shares, or to convert the paid-up shares into stock, "but save as aforesaid, and save as is hereinafter provided in the case of a change of

name, no alteration shall be made by any company in the conditions contained in its memorandum of association." The strongest possible provision seems to me to be thereby made, that there is to be no change whatever in the essential things mentioned in sect. 8, except so far as is expressly declared by sect. 12, or by sect. 13 as regards the change of the name of the company. The memorandum of association forms, indeed the charter of the company, to be modified only in the way provided by the statute. In the present case, by the memorandum of association, the capital of the company is divided into shares of two classes as to priority of dividends, and a certain amount is to be entitled to a preferential dividend which is payable out of the net revenue. The mode in which the net revenue is to be ascertained, is to be found in art. 82 of the articles of association. It would be in the power of the company under the articles of association to vary the mode of ascertaining the net revenue, but when the net revenue has been once ascertained, there appears to me to be no power whatever to alter the provisions of the memorandum of association, as to how the net revenue is to be applied. It has been suggested that in *Duke's Case* (1) there was a departure from the principles I have enunciated, but I do not so regard that case. Mr. *Duke* had signed the memorandum for fifty B shares, which received a preferential dividend. He afterwards agreed to become a director, for which the qualification was a holding of fifty shares. He thought it not fair that it should be in wholly paid-up shares, and therefore he applied for twenty-five shares in each class in lieu of the fifty B shares. It was there contended by the official liquidator that he was liable for those shares in addition to the fifty B shares, and that was the real question which was argued in that case. Under the circumstances of that case, it would have been contrary to all justice to have held that Mr. *Duke* could not have put the twenty-five A shares and twenty-five B shares together, as performing his covenant to take fifty shares. Then I think the case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (2) clearly establishes that it was beyond the power of the company in this case to depart from the conditions in the memorandum of association.

(1) 1 Ch. D. 620.

(2) Law Rep. 7 H. L. 653.

C. A. 1885 ASHBURY v. WATSON.

As to the second point, I do not think that those resolutions of the company which were *ultrà vires* could have been afterwards ratified by subsequent acquiescence, but assuming they could, there was no evidence that I can see of acquiescence with knowledge that the persons were acquiescing in *ultrà vires* resolutions.

FRY, L.J.:—

I am also of the same opinion. There are two points here for our decision. The first is, on the 12th section of the *Companies Act*, 1862, which provides that except as to certain modifications there mentioned, no alteration is to be made by any company in the conditions in its memorandum of association. Now in the present memorandum of association there are provisions as to priorities of shares, and the question is, whether those priorities are conditions in the memorandum of association within the meaning of the 12th section of the *Companies Act*, 1862. Now that section, it must be borne in mind, does not refer to necessary conditions or to essential conditions, and the 8th section, though it specifies certain conditions, does not say that no other conditions shall be in the memorandum of association. I am not prepared to say that there might not be inserted in the memorandum of association, details with regard to the management of the company which would not be conditions within the meaning of the 12th section, but I think that section does apply to all conditions in the memorandum of association, which may fairly be described as essential parts of the constitution of the company, and upon which it was established. Now was the provision with regard to priority of shares a condition of that description? I think it clearly was, for the distribution of the profits is one of the most essential parts of the constitution of a company, and I think this is illustrated by *Hutton* v. *Scarborough Cliff Hotel Company* (1). There the company was constituted under the *Companies Act*, 1862. Its memorandum of association stated the number of shares, but was silent as to the distribution of profits by way of dividends amongst the shareholders. The

(1) 2 Dr. & Sm. 514; 4 D. J. & S. 672.

company afterwards, by resolution at a general meeting, declared that a certain portion of the shares should have preference, and that the other shares should be postponed. The case then came before *Kindersley*, V.C., and he held the resolution to be inoperative, but declined saying what might be the effect of a special resolution passed pursuant to sect. 50 of the *Companies Act*, 1862. The case was taken by appeal to the Lord Chancellor, who said (1): "The memorandum declares that the capital of the company shall be divided into 12,000 shares of £10 each, a provision which shews that these 12,000 shares are necessarily *inter se* equal and of equal rights and privileges. But what is proposed to be done is, to divide these 12,000 shares into two portions, and to place the latter portion in a position of priority to the former. There is nothing in the regulations by which such a state of things is contemplated." He afterwards went on to say, that as the Vice-Chancellor had abstained from determining the question, whether it could be done by a resolution under the 50th section, he would not conclusively decide it, but that his opinion was that it could not be done where the result would be to produce inequality amongst the original shareholders. The company then passed a special resolution under sect. 50, and the case came again before *Kindersley*, V.C. "It is said," observed the Vice-Chancellor (2), "that there is nothing in the memorandum of association which prescribes that all the shareholders shall stand on an equal footing as to the receipt of dividends; but in the absence of any provision to the contrary, I think there is an implied stipulation to that effect; and that what is proposed to be done is contrary to the very nature of a joint stock company—and is an alteration in the constitution of the company—and I am of opinion that no necessity can justify the directors in acting on the resolution." He held, therefore, that to alter the priorities as defined by implication in the memorandum of association, was an alteration in the constitution of the company.

I think, therefore, both on authority and reason, that the mode of distribution of the dividends is an essential condition of the constitution of the company, and therefore one which cannot be

(1) 4 D. J. & S. 677. (2) 2 Dr. & Sm. 526.

C. A. 1885 ASHBURY v. WATSON. Fry, L.J.

altered. I will only make this further observation, that in the memorandum of association there should be a statement as to priorities of shares, if such priorities were intended at the time of the incorporation of the company, because, as was determined in *Hutton* v. *Scarborough Cliff Hotel Company* (1), silence in the memorandum with respect to the mode of distribution implies equality amongst the shareholders. Therefore the first point made on behalf of the Appellant fails.

The second point is, whether the Court ought to infer that the resolutions of 1872 were ratified by all the members of the company. Now I agree with the Master of the Rolls that it is not necessary to determine whether there be a scintilla of evidence. There is not in my opinion evidence in the present case on which this Court could conclude that the shareholders had ever accepted their dividends with a knowledge of what had taken place.

A point was started of great importance, namely, how far a transferee of a share is bound by acquiescence on the part of the transferor. As at present advised, I do not think that the transferee would take subject to any personal equity which might exist against the transferor, but it is not necessary that we should now determine that point. I agree with the other members of this Court, that this appeal must be dismissed with costs.

The Master of the Rolls has suggested to me that the language which I have used may be thought to import that no condition in a memorandum of association is essential unless it be required by sect. 8 of the Act. By essential condition I mean that which in fact is part of the essence of the constitution of the company, whether required by statute or not.

Solicitors: *Arthur T. Hewitt; Bircham & Co.*

(1) 2 Dr. & Sm. 514, 521; 4 D. J. & S. 672.

W. P.

WESTBURY-ON-SEVERN RURAL SANITARY AUTHORITY *v.* MEREDITH.

C. A. 1885 July 24.

[1884 W. 1643.]

High Court of Justice—Jurisdiction—Chancery Action—Subject-matter below £10 in Value—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 25, 34 [*Revised Ed. Statutes, vol. xvii., pp.* 72, 77, 82].

An action in the High Court, claiming relief which, before the *Judicature Act*, could have been given only by the Court of Chancery, cannot now be maintained if the subject-matter is below £10 in value.

The old rule of the Court of Chancery in this respect still remains in force.

THE Plaintiffs had expended the sum of £6 19*s.* 1*d.* in the execution of drainage works upon premises situate within their district of which the Defendant was the owner, and as such he was, under the provisions of the *Public Health Act*, 1875, liable to repay to the Plaintiffs the amount thus expended, with interest. A demand for payment had been served upon him on the 6th of March, 1880, but he had not paid the amount.

The Plaintiffs by this action claimed a declaration that the sum of £6 19*s.* 1*d.*, with what might be found due for interest thereon, was a charge on the premises, and that, if necessary, the charge might be enforced by a sale of the premises, and that the amount, with interest thereon and costs, might be paid to the Plaintiffs out of the proceeds of sale; and that a receiver of the rents and profits of the premises might be appointed.

The Defendant did not deliver any defence, and the Plaintiffs served notice of motion for judgment in default of pleading. The Defendant did not appear on the hearing of the motion.

Mr. Justice *Kay*, on the 8th of February, 1885, dismissed the action with costs, on the ground of the smallness of the amount claimed.

The Plaintiffs appealed.

Willis-Bund, for the Appellants:—

The old rule of the Court of Chancery (contained in rule 1 of Order IX. of the Consolidated Orders of 1860) was, no doubt, that "every suit, the subject matter of which is under the value of £10,

C. A. 1885

WESTBURY-ON-SEVERN RURAL SANITARY AUTHORITY v. MEREDITH.

shall be dismissed, unless it be instituted to establish a general right, or unless there shall be some other special circumstance, which, in the opinion of the Court, shall make it reasonable that such suit should be retained." But that rule has been abolished by the *Judicature Act*. The rule never existed in the Courts of Common Law, and now the High Court has the jurisdiction of the Court of Chancery and of the Common Law Courts: *Judicature Act*, 1873, s. 16.

[BAGGALLAY, L.J.:—Sect. 34 assigns such an action as this to the Chancery Division.]

Moreover, by sect. 25, sub-s. 11, an equitable remedy is given in respect of any common law demand.

The Defendant did not appear.

LORD ESHER, M.R.:—

It is clear to my mind that the decision of Mr. Justice *Kay* was right. The action is in respect of a matter the value of which is less than £10, and the Plaintiffs ask only to enforce a charge on the Defendant's property, and for the appointment of a receiver. An action claiming such relief could not before the *Judicature Act* have been brought in a Common Law Court. Nor could it then have been brought in the Court of Chancery, because the value of the subject-matter is under £10. Neither the Court of Chancery nor a Court of Common Law would then have had jurisdiction to give the relief which is sought. It is said that now the High Court can give a relief which neither the Court of Chancery nor a Common Law Court could have given before the *Judicature Act*. All that the *Judicature Act* has done is, to give to the High Court the jurisdiction which either the Court of Chancery or the Courts of Common Law had before. It has conferred no new right to relief. I give no opinion whether the Plaintiffs are entitled to any other relief. The appeal must be dismissed.

BAGGALLAY, L.J.:—

I am of the same opinion. The remedies given to a local authority by sect. 257 of the *Public Health Act*, 1875, are a personal demand and a charge on property. The latter remedy

is one the enforcing of which is, by sect. 34 of the *Judicature Act* of 1873, assigned to the Chancery Division. The remedy may also, if the amount is below £50, be enforced in a County Court, but it has been held that such a proceeding in a County Court must be taken within six months. The Plaintiffs have allowed that time to go by. *Primâ facie*, therefore, their remedy would be in the Chancery Division, but the objection is taken that a claim for an amount under £10 will not be entertained by the Chancery Division. It is suggested by Mr. *Willis-Bund* that the old rule of the Court of Chancery as to the value of the subject-matter of a suit has been abolished by the *Judicature Act*. I must confess myself unable to follow his argument. No doubt, the Common Law Division of the High Court can now exercise the jurisdiction which was formerly exercised by the Court of Chancery, and the Chancery Division can exercise the jurisdiction which was formerly exercised by the Courts of Common Law. But the *Judicature Act* does not confer on the High Court a jurisdiction which neither the Court of Chancery nor the Courts of Common Law possessed before it was passed. I will say nothing as to what remedy the Plaintiffs may have by other proceedings. The appeal must fail.

FRY, L.J.:—

Before the *Judicature Act* this action could not have been brought in a Common Law Court, because it seeks to enforce a charge, and it could not have been brought in the Court of Chancery, because the value of the subject-matter is under £10. It cannot, therefore, now be brought in the High Court, to which only the jurisdiction of those Courts has been transferred. The only other suggestion is, that, in the case of a common law right before the Act, the jurisdiction has been enlarged, so as to enable the High Court to give an equitable remedy in aid of the common law demand. But I cannot find any authority for that proposition.

Solicitor for Plaintiffs: *A. Parker*, agent for *M. F. Carter, Newnham.*

W. L. C.

Dicta of LORD ESHER, M.R., at p. 393, *applied. Re* TURNER. [1949] 2 All E.R. 935.

C. A.
1885
KAY, J.
Jan. 21.
C. A.
July 24.

In re HARRISON.
TURNER *v.* HELLARD.

[1884 H. 4263.]

Will—Construction—Supplying Blank—Right of Court to look at Original Will.

Applied. In re STEVENS, DECD. [1952] 1 Ch. 323

A testatrix in making her will used a law stationer's form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named, the testatrix gave all her property both real and personal "unto to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece *Catherine Hellard* to be executrix of this my last will and testament":—

Held, by *Kay*, J., and by the Court of Appeal, that there was an effectual gift of the residue to *Catherine Hellard*.

Per Lord *Esher*, M.R., and *Baggallay*, L.J.:—For the purpose of construing a will the Court is entitled to look at the original will as well as at the probate copy.

APPEAL from a decision of *Kay*, J., upon the construction of the will of *Hannah Wight Harrison*, spinster, who died on the 13th of July, 1884.

The document which the testatrix executed as her will was partly in print. She made use of a printed form of will in which there were various blanks left, intended to be filled up by the person using the form as he pleased. Some of these blanks the testatrix had filled up wholly or partially. The will as executed was as follows, the parts which were in the handwriting of the testatrix being indicated by italics, the rest being in print. The blanks or spaces are indicated by spaces:—

"This is the last will and testament of me *Hannah Wight Harrison, of* 103, *High Street, in the parish of Portsmouth, in the county of Hampshire.* I direct that all my just debts, funeral and testamentary expenses be paid and satisfied by my executr*ix* hereinafter named, as soon as conveniently may be after my decease. I give, devise, and bequeath all and every my household furniture, linen, wearing apparel, books, plate, pictures, china, horses, carts and carriages, and also all and every sum and

sums of money which may be in my house or about my person or which may be due to me at the time of my decease, and also all other my moneys which may be invested in stocks, funds, and securities for money, book debts, money on bonds, bills, notes, or other securities, and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy, unto

to and for *her* own use and benefit absolutely. And I nominate, constitute, and appoint *my niece Catherine Hellard* to be execut*rix* of this my last will and testament. And I hereby revoke all former or other wills and testaments by me at any time heretofore made, and I declare this to be my last will and testament."

This action was brought by originating summons, by one of the next of kin of the testatrix, as Plaintiff, against *Catherine Hellard*, as Defendant, to have the question determined whether the testatrix had by her will effectually disposed of her residuary personal estate, or whether there was an intestacy. The summons was heard by Mr. Justice *Kay* on the 24th of January, 1885.

W. Pearson, Q.C., and *Stallard*, for the Plaintiff, submitted that the printed form of will had been filled in so inaccurately that its meaning was indefinite; and that the will could not be construed without making an addition to it, therefore the Court should hold that there was an intestacy. They referred to *Hunt* v. *Hort* (1); *Baylis* v. *Attorney-General* (2); and *Taylor* v. *Richardson* (3).

Hastings, Q.C., and *George Williamson*, for *Catherine Hellard*, were not called upon.

KAY, J.:—

I confess I have no kind of doubt on this will as a matter of construction. I think it is quite proper in a case of this kind that the original will should be brought into Court, because it is very material to my mind to see the original will, and I find that

(1) 3 Bro. C. C. 311. (2) 2 Atk. 239.
(3) 2 Drew. 16.

C. A. 1885 *In re* HARRISON. TURNER *v.* HELLARD. Kay, J.

it is a printed form with certain spaces left by the printer. It is filled up in places by the testatrix in her own handwriting. In the printed form there are the words "I give, devise, and bequeath all my estate and effects unto." There is no blank down to the words I have read, but after the word "unto" comes a blank of several lines, which the testatrix did not draw her pen through, but left it as she found it. It is not cancelled and no name is there written. But the next words in the printed form are "to and for," and then there comes a blank, and it is filled up by the testatrix with the word "her." Whom does the word "her" mean? Of course if the testatrix meant to put a name into this blank, if it had been a blank of her own leaving, as if this had been a holograph will and she had left a blank herself, it might be extremely difficult to deal with it. But it is not a holograph will. Here is a blank left by the printer which might be filled up by the testatrix as she liked. She might have drawn a cancel line across it, or perhaps she thought the words would be quite intelligible without her interfering with the blank at all. How do they read? They read thus: "I direct my just debts to be paid by my executrix. I give all my estate, real and personal, unto to and for her own use and benefit absolutely." Then it goes on: "And I nominate, constitute and appoint my niece *Catherine Hellard* to be executrix." Now, if those words were read without the blank, no human being could doubt the meaning for a single moment. "I direct my debts to be paid by my executrix. I give all my estate unto, to, and for her own use and benefit absolutely, and I appoint my niece *Catherine* executrix." The only difficulty arises from the fact that the testatrix has not thought it necessary to draw a cancel line across the blank, or to repeat the name of *Catherine Hellard*, or to put any other name between the word "unto" and the words "to and for." It would have been more formal, right, and proper that she should have put in the name of *Catherine Hellard*, or whomever she meant to be her legatee, between "unto" and the word "to." But she has not done so, and am I to say that the will fails, when I can read it all, every word of it, and give effect to every word of it, and give it a most clear, simple, and intelligible meaning? In my opinion I am bound to construe it as I find it, and the last thing which the Court should

do is to hold that there is an intestacy. It seems to me that there is not an intestacy, as I read the words of the will; I hold that *Catherine Hellard* takes all the estate beneficially.

T. F. M.

From this decision the Plaintiff appealed.

The appeal was heard on the 24th of July, 1885.

W. Pearson, Q.C., and *Stallard*, for the Appellant:—

By filling up the blank as he has done, the Judge has, in effect, made a will for the testatrix. In the case of a will of personal estate the Court will not look at the original will, but only at the probate copy. The blank cannot be disregarded. The name of *Catherine Hellard* is mentioned in the will only as executrix; there is nothing to shew any intention to make her residuary legatee. The Court can only construe the words of the will as they stand. The will is void for uncertainty.

Hastings, Q.C., and *Cecil Russell*, for the Defendant, were not heard.

LORD ESHER, M.R.:—

In my opinion when you have to construe a disputed will you must look at the will and read it. You must use your eyes as one of the means given you to enable you to construe what people have said. The main argument in this case is founded on there being a blank in the will, and how can you tell that there is a blank without looking at the will? I know of no rule that for the purpose of construing a will you may not look at the original will itself. Looking at the will in the present case, it is impossible not to take notice of the fact that part of it is a common form, not drawn up for the purpose of this particular will. The blank spaces were not left by the testatrix herself, but were left for the purpose of being filled up by any testator who might happen to use the form. When the form is filled up as a will it must be read according to ordinary loose English grammar and ideas. There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it

C. A. 1885 *In re* HARRISON. TURNER v. HELLARD. Lord Esher, M.R.

a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule. I do not deny that this will may be read in two ways, or that it requires that a blank should be filled up. But it may be read in such a way as not to amount to a solemn farce. It is expressed elliptically. Instead of repeating the common part of several sentences, that common part is put in at the end, and the proper way to read it is to supply the common part after each sentence. Every document has to be read in this way. Here the words are, "I give unto, to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece *Catherine Hellard* to be executrix of this my will." Are not these words capable of being read as a gift to *Catherine Hellard?* No doubt the language is awkward and elliptical, but it is capable of being read in that way. I do not depart from what Mr. Justice *Kay* said, that the fact that this will is on a printed form, and not drawn for this particular testatrix, makes a great difference in the construction. I come to the conclusion that the testatrix intended to fill up the blank with the name of *Catherine Hellard*, though she has not done so. But the words are capable of being read as a gift to *Catherine Hellard*, and, applying the golden rule to which I have referred, the document ought to be read so as to make it a will, and not a blank piece of paper. As to there being any moral doubt about the meaning, no one who was not a trained lawyer would read it in any other way than as a gift to *Catherine Hellard*.

BAGGALLAY, L.J.:—

I am of the same opinion. I fully agree that for many purposes the first thing to be looked at is the probate copy of a will. But when I look at the probate copy in this case I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank, or with an intention not to fill it up. It then becomes very material to look at the original will, and upon looking at it we find that it is on a printed form in which blanks are left for the purpose of being filled up by the person who uses it. The testatrix has not filled in this

blank, and I think the only way in which you can construe the words is by reading them as if they were consecutive. The conclusion that the testatrix intended to fill up the blank at some future time would be inconsistent with her declared intention to revoke all former wills and make that her last will and testament. Reading the words in that way, though they are inartificial and not clearly expressed, I think they are sufficient to shew the intention. We must not, of course, guess at the meaning; but effect must be given to the language though it is inartificial. It appears to me impossible to come to any other conclusion than that the testatrix has indicated *Catherine Hellard* as the person who is to take the residue beneficially.

FRY, L.J.:—

It appears to me not essential on the present occasion to determine whether the proper document to look at for the purposes of construction is the probate copy or the will itself. In either document there is in the present case a blank. On the question of construction I have felt more doubt than my learned Brethren. But I assent to their conclusion, on the ground that where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy. I should have felt more doubt as to the construction in this case but for their opinion.

Solicitors for Plaintiff: *Smith, Fawdon, & Low.*

Solicitors for Defendant: *Williamson, Hill, & Co.*, agents for *Hellard & Son, Portsmouth.*

W. L. C.

C. A. 1885 July 24, 25.

In re RICHARDSON. SHILLITO *v.* HOBSON.

[1883 R. 455.]

Mortgage—Equitable Charge by Deposit of Deed—Invalid Transfer of Charge—Right to Deed.

Equitable mortgagee by deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed; and as his interest in the deed is only incidental to his interest in the mortgage the donee of the deed has no right to retain it.

THE testator, *Timothy W. Richardson*, was entitled in his lifetime to certain freehold lands, which he occupied at *Woodthorpe*, in the parish of *Sandal*, *Yorkshire*, and which had been conveyed to him by one *Thomas Green* by a deed of conveyance dated the 21st of May, 1875; and being indebted to the *Wakefield and Barnsley Union Banking Company* on the balance of his current account, he deposited such deed with such bank, in order to secure by an equitable mortgage of the lands comprised therein all moneys which might be owing by him at any time to the bank. It did not appear, however, that there had ever been any memorandum in writing of the terms on which the deposit was made. The testator, *T. W. Richardson*, died on the 16th of July, 1880, indebted to the bank, and on the 1st of February, 1881, *William Shillito*, since deceased, who was one of the executors of the will of the said *T. W. Richardson*, paid out of his own moneys the balance owing to the bank on the security of the said deed of May, 1875, and he then took up that deed from the bank, and kept the same afterwards in his own possession as security for the money he had so paid. *William Shillito* died intestate in June, 1882, and letters of administration to his estate were duly granted to the Plaintiffs, who brought this action against the surviving executor of *Timothy Richardson*, and also against the other Defendant, *William Watson Hobson*, who, it was alleged, had wrongfully obtained possession of the deed of May, 1875, and the Plaintiffs claimed, *inter alia*, a return of that deed or its value and damages for detaining it, or in the alternative a declaration that

the moneys secured by such deposit belonged to the Plaintiffs as the legal personal representatives of *William Shillito*, deceased. At the trial before Mr. Justice *Kay*, the Defendant *William W. Hobson* gave evidence that he attained the age of twenty-one on the 22nd of April, 1882, and that on that day the deceased *William Shillito*, who was his uncle, handed him the deed of May, 1875, saying as he did so, "Now *Billie*, my boy, thou comest of age this day and I give thee this deed, and the whole of the money I have paid to redeem it, and I hope thou wilt take care of it." It was admitted that there was no writing whatever from the uncle *Shillito* to his nephew, or other assignment than what had so taken place of the said deed or of the money for which it was security. The learned Judge held that the gift said to have been made by *Shillito* to his nephew was only a voluntary contract incapable of being enforced in equity, and that the Defendant *William W. Hobson* had therefore no right to the equitable mortgage nor to retain the deed of May, 1875. He accordingly ordered that the Defendants should deposit such deed in Court, and declared the Plaintiffs, as administrators of *William Shillito*, deceased, to be entitled to be considered as mortgagees of the lands comprised in such deed for the amount paid by *William Shillito*, deceased, to the bank, less what might be found due from the estate of *William Shillito* upon the accounts which he directed to be taken. It is not necessary for this report to refer to the other matters in the action.

The Defendant *William W. Hobson* alone appealed.

Hastings, Q.C., and *Swinfen Eady*, for the Appellant:—

Mr. Justice *Kay* thought that the effect of sect. 25, sub-sect. 6, of the *Judicature Act* of 1873, enabling assignments at law of *choses in action*, was to prevent any interest in a debt or other *chose in action* passing without an assignment in writing. But, whatever might be the right to the debt, the deed was given to the Appellant, and being therefore in his possession it cannot be taken away from him. He is entitled to keep it, and to make what advantage he can of it: *Rummens* v. *Hare* (1); *Barton* v. *Gainer* (2).

(1) 1 Ex. D. 169. (2) 3 H. & N. 387; 27 L. J. (Ex.) 390.

C. A. 1885 *In re* RICHARDSON. SHILLITO *v.* HOBSON.

The learned Judge at the trial considered that those cases would apply only when the person who has made a gift of a chattel has an absolute interest in it. But, by the delivery of a chattel, a man passes whatever interest he may have in it; if he has only a special property, that property passes. He cannot enlarge the interest which he has, but he can by delivery pass his interest, whatever it may be. The pledger of a chattel can by delivering it to a third person pass to him the right which he has to hold it: *Donald* v. *Suckling* (1).

[LORD ESHER, M.R.:—An unpaid vendor of goods has a right to hold them, though the property in them has passed to the purchaser, until the purchase-money has been paid. Can he pass the right to another person by delivery of the goods?]

That depends on different considerations. The question whether the property in goods has passed is one of intention. There may be a right to hold deeds independently of the right to the property to which they relate: *Heath* v. *Crealock* (2).

[BAGGALLAY, L.J.:—Did not *William Shillito* hold the deed as executor of *Richardson*, though he might have a claim against *Richardson's* estate for the money which he advanced to pay the bank?]

The Plaintiffs do not represent *Richardson's* estate. By paying off the bank *William Shillito* became the owner in equity of the equitable mortgage, and had a right to hold the deed until he was repaid what he had advanced. This right passed to the Appellant by delivery of the deed.

W. Pearson, Q.C., and *R. W. Ingham*, for the Plaintiffs:—

The story of the Defendant as to the way in which he obtained the deed is full of suspicion. Mr. Justice *Kay* did not say whether he believed it or not, for he decided the case against the Appellant on a point of law, assuming his story to be true. There is no evidence of the gift of the deed to the Appellant but his own. The Court will not admit a claim against the estate of a dead man on the unsupported evidence of the claimant: *Hill* v. *Wilson* (3). The Appellant's evidence is not confirmed. But

(1) Law Rep. 1 Q. B. 585. (2) Law Rep. 10 Ch. 22.
(3) Law Rep. 8 Ch. 888.

assuming the account given by the Appellant to be correct of what took place when the deed was delivered to him, still the mortgage debt which was secured by the deposit of the deed did not thereby pass. The equitable mortgage was transferred to *Shillito* when he redeemed the deed, because he gave a valuable consideration for it, but when *Shillito* gave the deed and mortgage debt to his nephew there was no consideration, and the transaction could only amount to an agreement by *Shillito* to assign it, and which, being a voluntary one, a Court of Equity would not enforce. The deed was mere evidence of the equitable mortgage, and such mortgagee would only have a right to the possession of it until the debt which it secured was paid. He is a trustee of such deed for the mortgagor, who would have a right to redeem it, and if the deed were lost the mortgagor would be entitled to an indemnity: *James* v. *Rumsey* (1). The case of *Rummens* v. *Hare* (2) is relied on by the Appellant as shewing that the document itself might pass to the donee by the gift, though for want of an assignment the right to the money secured by it would not pass, but there the person who gave the document was the absolute owner of it, which is very different from a case like this, where the person giving had no such property in it, but only a right to keep it until redeemed. The present case somewhat resembles that of *Searle* v. *Law* (3), where certain shares not legally passing by a voluntary deed of settlement, were required to be given back to the personal representatives of the deceased settlor. The appeal has been argued only on behalf of the Appellant in respect of so much of the judgment as orders the deed to be given up, and therefore in any case the rest of the appeal must be dismissed.

Swinfen Eady, in reply.

LORD ESHER, M.R.:—

It seems to me as a matter of fact that there is nothing which in any way reflects against the character of the young man, the Appellant, and that the account which he gave of what took

(1) 11 Ch. D. 398. (2) 1 Ex. D. 169.
(3) 15 Sim. 95.

C. A. 1885

In re RICHARDSON. SHILLITO *v.* HOBSON.

Lord Esher, M.R.

place between himself and his uncle, the late Mr. *Shillito*, ought to be taken as true. If corroborative evidence was necessary, I think that there was such evidence, and the circumstance that the old man was making gifts to the different members of his family, fortifies the account which the nephew gave of the interview between himself and his uncle. Then, accepting such account as true, *Shillito* gave to his nephew as far as he could the deed and the debt for which the property was charged, but not knowing the law he did not transfer the charge in a way which would make it a valid gift. That raises, therefore, this question as a point of law; if he did not transfer the charge, could he transfer the deed, that is to say, could he transfer the deed without the charge? Now I have come to the conclusion that that which constitutes an equitable charge is the delivery of the deed, and therefore if you cannot transfer the charge it is difficult to see how you can transfer that which constitutes the charge. The possession of the deed under these circumstances gives the person who has it a peculiar equitable right. It does not constitute a lien, or give the person who has it any special property therein. It constitutes nothing but an equitable charge, and therefore you cannot transfer the deed if you cannot transfer the equitable charge. Consequently, though *Shillito* meant to give this deed to his nephew, the Appellant, he could not do so in the way he gave it, and the judgment appealed against is right.

BAGGALLAY, L.J.:—

I am of the same opinion. The case raises two questions: one, whether the account which the present Appellant gave of the circumstances under which the gift was made to him is true; and the other is, assuming it to be true, whether the gift is one to which effect can be given? Now as to the first point, Mr. *Pearson* contended that according to the general principle of equity the evidence of a person on his own behalf would not be accepted and acted on in the absence of corroboration; and on being asked for an authority for this, he cited *Hill* v. *Wilson* (1). No doubt there are cases in which a mere statement by a person on his own behalf, if not corroborated, will not have much, if any, weight

(1) Law Rep. 8 Ch. 888.

given to it. But all those cases depend on their own special circumstances. In *Hill* v. *Wilson* (1) a person had given a promissory note of his for the payment of money at a particular period, and after the death of the holder of the note to whom it had been so given, it was set up by the maker that the holder had agreed not to call for the principal if the interest was from time to time paid. Of course that was a matter very difficult to be met after the decease of the holder, and what Lord Justice *James* said (2) was this:—"The evidence given is the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead. Even if such evidence be legally admissible for any purpose, the interests of mankind, in my opinion, imperatively require that, unless corroborated, it should be wholly disregarded;" that is to say, evidence contradicting the witness's own act, and given after the death of the only person who could controvert it, and whose interests were affected by it. But often the surrounding circumstances may be such that the unsupported testimony will have full credit given to it. In this case I think the surrounding circumstances all point to the fact of the probability, at any rate, of Mr. *Shillito* having done that which his nephew states he did. [After referring to these circumstances, and stating that he saw no reason from them to disbelieve the statement of the Appellant that his uncle, the testator, gave him the deed, telling him that he gave him the deed and the money due on it, his Lordship proceeded as follows:—] Now it has been established by *Edwards* v. *Jones* (3) and a number of authorities, that such a transaction would practically be considered only to amount to a parol agreement to make over the benefit of this equitable mortgage, and there being no consideration for it, and it not having been carried out by an effectual deed of assurance, it would not avail.

Mr. Justice *Kay* took that view of the case, and therefore he considered the Plaintiffs, as the administrators of the deceased, *Shillito*, were entitled, notwithstanding this attempted gift to the Appellant, to be treated as the equitable mortgagees; and,

(1) Law Rep. 8 Ch. 888. (2) Law Rep. 8 Ch. 900.
(3) 1 My. & Cr. 226.

C. A. 1885 *In re* RICHARDSON. SHILLITO *v.* HOBSON. Baggallay, L.J.

making a declaration to that effect, he directed an inquiry of what was due to the Plaintiffs, and that the deed, which was the evidence of the equitable mortgage, should be given up to them as such administrators. The appeal in the first instance went against the whole of this order of Mr. Justice *Kay*; but Mr. *Hastings* prudently dropped the appeal against that which had reference to the ownership of the equitable mortgage, in order that he might bring this down to simply an action of *detinue* for the recovery of the deed, and so get the case within the decision of *Rummens* v. *Hare* (1) and *Barton* v. *Gainer* (2), on which he relied. The distinction between cases of the kind such as *Rummens* v. *Hare* and that which we are now dealing with was pointed out by Lord Justice *Mellish* in that case; for in drawing attention to the facts with regard to *Searle* v. *Law* (3), a case the other way, he says (4): "There the document was only claimed on the ground that the plaintiff had a beneficial interest under it, so this question was not raised."

Now, it being admitted, as it must be admitted by the Appellant in this case, that he cannot dispute the right of the Plaintiffs as representing the estate of *Shillito* to the beneficial interest in the equitable mortgage, the endeavour on the part of the Appellant to say that that right does not apply to the possession of the deed which is the indication of the right must fail, for it is not possible to separate the possession of the deed from the right to the beneficial interest under the equitable mortgage.

FRY, L.J.:—

I am of the same opinion. In my judgment it is not necessary to say anything with regard to the supposed rule of evidence or Chancery practice, to the effect that no person can succeed on his own uncorroborated evidence, because in the present case the evidence of *William Hobson*, the Appellant, appears to me to be corroborated; and therefore I proceed to determine this case on the same assumption on which the learned Judge proceeded, namely, that the evidence of the Appellant is to be believed.

It appears to me that the substantial question in this case is

(1) 1 Ex. D. 169.
(2) 3 H. & N. 387; 27 L. J. (Ex.) 390.
(3) 15 Sim. 95.
(4) 1 Ex. D. 171.

what was the nature of *Shillito's* title at the time he handed over the deed to *William Hobson*. It is admitted that *William Shillito's* title was the same as the title of the bank, and, therefore, the inquiry is what was the title of the bank. Now, all that we know with regard to that is from the admissions, by which it appears that the debt due to the bank was secured by an equitable mortgage of the hereditaments in question, and that there was only one document deposited, which was the deed of May, 1875. Therefore, the admission is, that a deposit of one deed was made which created an equitable security of the debt due to the bank.

The question then is this. Is there incident to every equitable mortgage by deposit, a pawn of the deeds deposited, or are the deeds handed over merely as incident to, and as inseparable from, the equitable charge? It appears to me that one must bear in mind what would be the rights of the pawnee, if a pawn were created by the deposit of the deed. The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice if no time be fixed; and, therefore, if there be involved in every equitable mortgage by deposit a pawn of title-deeds, we are led to this extraordinary conclusion, that the equitable mortgagee would have not merely the right to hold the title-deeds until his debt was paid, but also the right to sell those deeds. Now, that seems to me to be so absurd and improbable that I conclude that upon a mere equitable mortgage by deposit there is no pawn of the deeds, but that the deeds are held by the equitable mortgagee merely as incident to the charge on the land. It is because the deeds are so connected with the estate that the deposit of them creates the equitable mortgage, and it would be a remarkable conclusion to hold that the deeds after that could be separated from the estate.

Then arises this question. If *William Shillito* was not pawnee, as in my opinion he was not, but only held the deed as incident to the charge, could he alienate the charge by a mere voluntary gift? There are two answers to that question. In the first instance, the Court below has declared the Plaintiffs entitled to the equitable charge, and against that part of the decree the

C. A. 1885 *In re* RICHARDSON. SHILLITO *v.* HOBSON. Fry, L.J.

Appellant has not opened his appeal. Therefore it is impossible to determine that point in his favour. But, in the second place, supposing that part of the case was still open to the Appellant, it appears to me that *Edwards* v. *Jones* (1) and a long series of cases to the same effect preclude him from the contention that by the mere handing over of the deed, the equitable estate or charge passed. I think, therefore, that there being no pawn, it is impossible to say that any special property in the deed passed from *Shillito* to *William Hobson*, and that it being impossible for *Shillito* to give the equitable charge by merely handing over the deed, the claim of the Appellant fails, and this appeal must be dismissed.

Solicitors for Appellant: *Badham & Williams.*
Solicitors for Respondents: *Ridsdale & Son.*

W. P.

C. A. 1885 PEARSON, J. *Feb.* 3. C. A. *July* 27.

HAYWOOD *v.* SILBER.

[1884 H. 2327.]

Lessor and Lessee—Underlease—Agreement that Underlease shall contain the same Covenants as original Lease—Covenant against Assignment.

The Plaintiff, who was lessee of part of the property of a hospital, agreed with the Defendant to grant him an underlease, "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the Plaintiff, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible), together with such other covenants, clauses, and provisoes as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute relating to the demised premises should arise between the lessee and any other tenant of the hospital, it should be referred to the arbitration of the hospital; (2) that the lessee, his executors, administrators, or assigns would not assign or sublet without the license of the hospital; (3) that all demises and assignments of the demised premises should be prepared by the solicitors of the hospital:—

Held, by *Pearson*, J., and by the Court of Appeal, that the covenants in the original lease were not to be taken as models and inserted into the underlease with the names of the underlessor and underlessee substituted for the names of the original lessors and lessee respectively, but that the Plaintiff was entitled to have them inserted without modification, so as to

(1) 1 My. & Cr. 226.

bind the underlessee to refer disputes with tenants of the hospital to the arbitration of the hospital, not to assign or underlet without the consent of the hospital, and to have his demises and assignments prepared by the solicitors of the hospital.

Williamson v. *Williamson* (1) distinguished.

THIS was an action for specific performance of an agreement by the Defendant to take an underlease from the Plaintiff of premises in *Fell Street*, in the city of *London*.

The Plaintiff was lessee of the property for eighty years under a lease granted to him in July, 1882, by the Governors of *St. Bartholomew's Hospital*. This lease contained, *inter alia*, the following covenants by the lessee:—"That if any dispute or difference shall arise between the said lessee, his executors, administrators, or assigns, and any other tenant or tenants of the said lessors, for or concerning the lights, easements, ways, watercourses, boundaries, dimensions of ground, or any other matter, cause, or thing of or belonging to the said demised premises, then the said lessee, his executors, administrators, or assigns, shall and will, on his or their parts, refer all and every such disputes and differences to the president or treasurer or to a committee of the said lessors, meeting at the counting-house of the said hospital, and abide by, and perform, fulfil, and keep the award and final order of the president or treasurer, &c., for or concerning any such dispute or difference. And also that the said lessee, his executors, administrators, or assigns shall not, nor will at any time during the said term hereby granted, bargain, sell, demise, lease, assign, transfer, or set over this indenture of lease, or the said warehouses or buildings and premises hereby demised, or any part thereof, to any person or persons whomsoever, for the whole or any part of the term hereby granted, except with the license and consent of the said lessors, their successors or assigns, first had and obtained, to be signified in writing for that purpose; and so from time to time, as often as any such demise, lease, assignment, or transfer shall be made as aforesaid; and that every such license and consent shall go only to the demise, lease, assignment, or transfer for which the same shall be granted, and shall not be considered or construed to exonerate the said lessee, his executors, administrators, or assigns,

(1) Law Rep. 9 Ch. 729.

C. A. 1885 HAYWOOD v. SILBER.

or his or their underlessee or underlessees, or their executors, administrators, or assigns, from the necessity of procuring a similar license and consent on every future occasion. And also that all mesne demises, leases, assignments, or transfers of the said demised premises, or any part thereof, shall be prepared by the solicitor to the said hospital for the time being, or by his order, procurement, leave, or permission, and by no other person or persons whomsoever."

There was a proviso of re-entry if the lessee, his executors, administrators, or assigns, should not at all times during the term perform, fulfil, and keep all the covenants, conditions, and agreements on his and their parts to be observed, kept, done, and performed.

On the 8th of December, 1882, an agreement was entered into for an underlease of the property to the Defendant for twenty-one years. This agreement, which was in the shape of an offer by the Defendant, accepted by the Plaintiff, contained the following clause:—"The lease and counterpart of lease to be prepared by landlord's solicitor at my expense, and to contain all usual, ordinary and customary covenants, clauses and provisoes, (including a covenant not to assign or underlet without the consent of the lessor, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible,) together with such other covenants, clauses and provisoes as are contained in the lease under which the said premises are held."

The Plaintiff inserted in the draft underlease covenants by the Defendant in the same terms as those above, without any variation except that the word "governors" was substituted for "lessors" wherever the latter term occurred. The Defendant objected to the insertion of these covenants, and insisted that no proviso against assigning or underletting ought to be inserted except that provided for by the agreement requiring only the consent of the Plaintiff, which was not to be withheld if the proposed assignee or underlessee was respectable or responsible. The parties being unable to come to terms, the present action was brought, and came on for trial before *Pearson*, J., on the 3rd of February, 1885.

Cozens-Hardy, Q.C., and *T. H. Carson*, for the Plaintiff, referred to *Fry* on Specific Performance (1); *Hyde* v. *Warden* (2); *Lewis* v. *Bond* (3); *Sear* v. *House Property and Investment Society* (4); *Evans* v. *Davis* (5); *Williamson* v. *Williamson* (6).

Cookson, Q.C., and *F. Thompson*, for the Defendant, relied on the construction of the agreement and on *Williamson* v. *Williamson*.

PEARSON, J.:—

The Plaintiff was the lessee under *St. Bartholomew's Hospital* of some warehouses, and he agreed, in writing, to grant to the Defendant an underlease. The Defendant when he entered into the agreement knew, or must be taken to have known, what in substance the covenants contained in the lease from *St. Bartholomew's Hospital* to the Plaintiff were. That has not been disputed. The only dispute is as to the form of the underlease and the covenants which ought to be contained in it.

Now with regard to that, the agreement between the Plaintiff and the Defendant is express, and, to my mind, it is so plain that one need only read it to understand what the underlease ought to contain. The agreement is in these words: "The lease and counterpart of lease to be prepared by landlord's solicitor at my expense" (that is, at the Defendant's expense) "and to contain all usual ordinary and customary covenants, clauses, and provisions (including a covenant not to assign or underlet without the consent of the lessor, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible)." That is not the end of it, but I stop there for a moment. If Colonel *Haywood* had been the freeholder I assume that the agreement with regard to the lease would have stopped there and it would then have contained a statement of everything necessary for a proper lease from the freeholder. But, inasmuch as the Defendant knew that the Plaintiff was only a lessee under *St. Bartholomew's Hospital*, and that the lease from *St. Bartholomew's Hospital* to him contained covenants and provisoes which were

(1) 2nd Ed. plac. 356.
(2) 3 Ex. D. 72.
(3) 18 Beav. 85.
(4) 16 Ch. D. 387.
(5) 10 Ch. D. 747.
(6) Law Rep. 9 Ch. 729.

C. A. 1885 HAYWOOD v. SILBER. Pearson, J.

not usual, and which would not be included under the words which I have read, he in the proposal which he made for a lease added these words, "together with such other covenants, clauses, and provisoes as are contained in the lease under which the said premises are held." I read those words "together with" as if they had been "in addition to what has gone before, such other covenants, clauses, and provisoes as are contained in the lease from *St. Bartholomew's Hospital.*" When you thus expand these words to their full meaning, it is the same thing as if the agreement had said, "and in addition the following covenants, clauses, and provisoes which are contained in the lease from *St. Bartholomew's Hospital* to Colonel *Haywood.*" If those covenants, clauses, and provisoes had been all written out in full in the agreement there could have been no doubt whatever that the covenants in question would be covenants which are not contained in the former part of the sentence. I have not, therefore, to decide what would be a proper lease between the parties; I have simply to construe this clause, and I cannot entertain any doubt that these words are sufficient to express this—that any covenants, clauses, and provisoes contained in the lease from *St. Bartholomew's Hospital* to Colonel *Haywood*, which would not come under the description of ordinary and customary covenants, clauses, and provisoes as between an ordinary lessor and ordinary lessee, were intended to be and must be included in the underlease from the Plaintiff to the Defendant.

It has been contended that I am precluded from thus deciding by the decision of the Lords Justices in *Williamson* v. *Williamson* (1). But I take the *ratio decidendi* there to have been that which Lord Justice *James* expressed, viz., that in that case the original lease was to be merely the model for the lease from the lessee to his underlessee. That is very different from the present case. I am only giving effect to the plain words of the agreement, which, as it seems to me, are so clearly expressed that there can be no doubt about their meaning.

W. L. C.

The Defendant appealed. The appeal came on for hearing on the 25th of July, 1885.

(1) Law Rep. 9 Ch. 729.

Cookson, Q.C., and *F. Thompson*, for the Appellant:—

The agreement provides that the underlease is to contain a covenant by the Defendant not to assign without the consent of the Plaintiff, and it is also to contain such "other" covenants as are contained in the original lease. No force is given to the word "other" unless you hold it to exclude covenants against assignment. Moreover, the case is governed by *Williamson* v. *Williamson* (1). That case decides that where a man covenants for himself, his executors, administrators, and assigns, not to do a particular thing, that does not bind his underlessees. An underlessee is not an assign: *Hogg* v. *Brooks* (2). Colonel *Haywood* therefore cannot be exposed to forfeiture if the Defendant assigns without the license of the governors, and nothing more is required for his protection than such a covenant as the agreement in terms stipulates for. Then, as to the other covenants, to require them to be inserted is making a tripartite agreement between the governors, the Plaintiff, and the Defendant, whereas the agreement is only between Plaintiff and Defendant, and giving the governors, who have no privity with the Defendant, a benefit which they do not take under the original lease. There is no provision in the original lease that an assignment of an underlease should be prepared by the solicitor of the governors. There is no provision in it that disputes between tenants of the governors, and underlessees who are not tenants of the governors, should be settled in manner therein mentioned. Colonel *Haywood* would not be liable if his undertenant were to assign without the consent of the governors, or were to refuse to submit disputes to them, the covenants therefore are not wanted for Colonel *Haywood's* protection. The true construction of the agreement is this—except where it provides for a covenant in a particular form, as in the case of the covenant about assignment, the covenants in the original lease are to be inserted *mutatis mutandis* in the underlease, so as to make them apply between the Plaintiff and Defendant, not between the governors and the Defendant. This is the view taken in *Williamson* v. *Williamson*. Colonel *Haywood* should be put in the place of the governors.

(1) Law Rep. 9 Ch. 729. (2) 14 Q. B. D. 475.

C. A. 1885

HAYWOOD v. SILBER.

Cozens-Hardy, Q.C., and *T. H. Carson*, for the Plaintiff, were not called upon.

COTTON, L.J.:—

In this case unfortunately there has been a dissension between the Plaintiff and the Defendant as to the terms upon which an underlease, which the Defendant had agreed to take from the Plaintiff, was to be granted. Of course the terms of the underlease must depend on the agreement between the parties, and what we have to do is to construe that agreement.

The material part of the agreement is this, "The lease and counterpart of lease to be prepared by landlord's solicitor at my" (the Defendant's) "expense, and to contain all usual, ordinary, and customary covenants, clauses and provisoes, (including a covenant not to assign or underlet without the consent of the lessor, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible)." Stopping there, I think that this clause throws into the class of usual and ordinary covenants a covenant not to assign or underlet without the consent of the lessor, with a proviso to prevent that consent being unreasonably withheld. Of course "the lessor" there must mean the party to whom the offer is made, viz., Colonel *Haywood*. Then it goes on, "together with such other covenants, clauses, and provisoes as are contained in the lease under which the said premises are held." It has been contended that the word "other" prevents any covenant as to not assigning in the original lease from being included among the covenants, clauses, and provisoes here referred to. In my opinion that is not the true construction. A covenant not to assign without the consent of Colonel *Haywood* is not one of the covenants in the original lease. What I think the clause means is "together with or in addition to such covenants, not coming under the description of usual ordinary and customary covenants, as are contained in the lease under which the premises are held." For my own part I am inclined to think that the express putting amongst the usual covenants a covenant not to assign without the consent of the proposed lessor, is emphatic as regards one of the questions which

we have to determine. The form of the agreement in the present case is so different from that in *Williamson* v. *Williamson* (1), that we can deal with this case on what appears to us the true construction of the contract, without feeling ourselves to be any way acting contrary to the decision in *Williamson* v. *Williamson*, though we arrive at a different result.

The questions in dispute are three. One is with reference to the covenant contained in the original lease, that if any dispute or difference shall arise between the original lessee, Colonel *Haywood*, his executors, administrators, or assigns, and any other tenants of the governors, for and concerning certain matters, then the lessee, Colonel *Haywood*, his executors, administrators, and assigns, shall on their part refer all such disputes to the president or treasurer or a committee of the governors, and abide by their order. The Plaintiff desires to include in the proposed underlease a covenant with himself that the underlessee shall refer such differences to the same tribunal. Is he right? It has been urged that the governors have nothing to do with the Defendant, and that the Defendant has nothing to do with them; but they have other adjoining property and they have tenants there, and it would be most unreasonable to modify this covenant (which it is agreed must be inserted with some modification) so as to make it a provision that if any dispute or difference arise between the underlessee and any tenants of Colonel *Haywood*, who apparently has no property in the neighbourhood, that dispute shall be referred to the decision of Colonel *Haywood* and the underlessee will abide by his decision. I think that, having regard to the terms of the agreement, this is a covenant, not a usual one, which under the terms of the contract ought to be inserted in the underlease, and that it ought not to be inserted with a variation substituting Colonel *Haywood* for the governors, which would make the covenant inapplicable to the existing state of circumstances, but ought to be so framed as to make the underlessee agree, as Colonel *Haywood* has done, that if any difference should arise between the underlessee and any tenants of the original lessors it should be referred to the arbitration provided by the original lease.

(1) Law Rep. 9 Ch. 729.

[C. A. 1885 HAYWOOD v. SILBER. Cotton, L.J.

Then there comes another question as to the covenant not to assign without the license of the governors, the original lessors. That, in my opinion, has been properly also introduced into this underlease. There is an express stipulation that there shall be a covenant not to assign without the license of Colonel *Haywood*, the underlessor, but it is also stipulated that the underlease shall also contain such other covenants, clauses and provisoes, not coming within the class of ordinary and customary covenants, clauses and provisoes, as were contained in the original lease. That a restriction on alienation by an underlessee was contemplated by the original lease is, I think, pretty clear from the words in the latter part of the covenant as to not assigning without license, "and every such license and consent shall extend and go only to the demise, lease, assignment, or transfer for which the same shall be granted, and shall not be considered or construed to exonerate the said lessee, his executors, administrators, or assigns, or his or their under-lessee or lessees, or their executors, administrators, or assigns, from the necessity of procuring a similar license and consent on every future occasion." In my opinion, having regard to the form of that covenant and to the terms of the contract between these two parties, it is right that that covenant should not be treated as merely a model in which the names of the under-lessor and the under-lessee are to be substituted for the names of the original lessors and the original lessee, but that a covenant should be inserted by which the under-lessee undertakes with the under-lessor not to assign without the consent of the original lessors.

The remaining point, probably, is not so material, viz., as to the covenant that all leases and transfers shall be prepared by the solicitor to the hospital. It would be quite right, according to the Appellant's contention, that the covenant in the original lease should be treated as a model for a stipulation to be inserted that all deeds are to be prepared by the solicitor of the under-lessor, Colonel *Haywood*, but the Plaintiff is not content with that, and that being so, I think that it is right to transfer this covenant, not by taking it as a model, and substituting throughout the names of the under-lessor and the under-lessee for the names of the original lessors and the original lessee, but by taking a

covenant stipulating, as between the under-lessor and under-lessee, that the under-lessee will as regards his acts and transfers observe the stipulation into which, as regards his own acts and his own transfer, the under-lessor as lessee has entered into with the original landlords. It is said that the governors cannot have any interest in that, but I think that they have certainly quite as much interest as Colonel *Haywood*, for they have other property in the neighbourhood, and it must be desirable for them to see what are the covenants and stipulations contained in the instruments under which persons deriving title through tenants of the hospital hold parts of the hospital property.

I think, therefore, that Mr. Justice *Pearson* was altogether right in his decision.

LINDLEY, L.J.:—

I am of the same opinion. The controversy which has arisen between these two gentlemen must be decided with reference to the bargain into which they have entered. That bargain contains the clause which has been read by Lord Justice *Cotton*, and which I need not go through again, but upon which it is necessary to make a few observations. It consists of two parts. First of all it says that the lease and counterpart are to be prepared by the landlord's solicitor, and to contain all usual, ordinary and customary covenants. That is the first thing. Then it goes on in a parenthesis to say that among customary covenants is included a covenant not to assign or underlet without the consent of the under-lessor, and there is a proviso that the consent is not to be withheld improperly. That is what I may call the first part of that clause. Then it goes on to say in substance: "In addition to the stipulation we have already made, the lease which Colonel *Haywood* is to grant is to contain such other covenants, clauses, and provisoes as are contained in the lease under which the said premises are held." That is clearly an additional stipulation that the lease to be prepared is to contain all these other covenants, in addition to the usual covenants, or what are to be treated as the usual covenants, under the first part of the clause.

We then come to consider how the lease is to be framed in pursuance of that agreement. I confess I do not see how the

C. A. 1885 HAYWOOD v. SILBER. Lindley, L.J.

lease can be framed except as Colonel *Haywood's* advisers insist that it shall be framed. I do not see any other mode of satisfying the words of the agreement. I do not think that that mode of framing it is open to the objection that it is not logical, and is making a tripartite agreement. That is not at all what is meant. We must construe the agreement having regard to its objects and to the facts and circumstances of the case, and if we bear in mind the somewhat remarkable language of the agreement, and bear in mind also the somewhat peculiar nature of this property, which is a portion of larger property belonging to *St. Bartholomew's Hospital*, it appears to me that Colonel *Haywood's* construction is correct.

I should not have had, I confess, much doubt (if any) about the case, had it not been for *Williamson* v. *Williamson* (1), but when we look at that case we find that the contract there was materially different, as also were the circumstances of the property. The contract is different in this respect, the contract in *Williamson* v. *Williamson* consisted only of one portion of the clause we have got here. It provided simply that the underlease should contain the like provisions, conditions, and stipulations in all respects as were contained in the original lease, and did not contain any such bargain as we have here, that the underlease is to contain all usual and customary clauses. We have here two stipulations, both of which must be satisfied, and the only way of satisfying them appears to me to be that which Mr. Justice *Pearson* has followed.

BOWEN, L.J.:—

I am of the same opinion.

The Defendant here objects to three covenants which the Plaintiff is seeking to impose upon him; first, a covenant by virtue of which disputes, if they arise, are to be referred to the original lessors, the Governors of *St. Bartholomew's Hospital*; secondly, a covenant by which no assignment is to be made except with the consent, not merely of the lessor himself, but of the original landlord, *St. Bartholomew's Hospital;* thirdly, a covenant by which mesne demises are to be submitted to and prepared by the

(1) Law Rep. 9 Ch. 729.

solicitor, not of the lessor himself, but of the original landlord, *St. Bartholomew's Hospital.*

The question entirely turns upon the true reading of the agreement between the Plaintiff and Defendant, which, after stating that all usual and ordinary and customary covenants are to be contained in the lease, says, that all such other covenants are also to be contained in it as are contained in the lease under which the premises are held.

The Appellant's counsel contend that the true construction to be put upon the words "such other covenants," is to treat them as providing for the insertion of covenants which were to repeat the covenants of the old lease *mutatis mutandis*, retaining the words of the covenant but changing the parties; transcribing, as is said in *Williamson* v. *Williamson* (1), the covenants from one to another, merely changing the names so as to introduce the proper lessor and the proper lessee.

Now there may be many leases with regard to which a similar provision to this would be amply fulfilled by doing that. In *Williamson* v. *Williamson*, Lords Justices *James* and *Mellish* thought that doing so would satisfy the contract for the sub-lease, but they did not lay down any general rule that a contract of that nature must always be treated in that way. You cannot make a rule of construction which will apply to all cases, whatever be the terms of the agreement or the character of the property.

There was another proposition suggested by the Appellant's counsel, viz., that these words only point to such covenants as were absolutely necessary for the protection of the lessee against his head landlord under the original lease. That cannot be a universal rule. In many cases the insertion of such covenants might be sufficient, but it is not necessarily so. It is necessary to look at the contract itself, and at the circumstances under which it has been given, in order to construe it.

Here we find a case quite distinguished from *Williamson* v. *Williamson*. That was a case of mining property. The landlord was the owner of the mine and the lessees were sub-letting the mine. There was no connection between that property and any other property of the landlord which would render the enjoy-

(1) Law Rep. 9 Ch. 729.

C. A. 1885 HAYWOOD v. SILBER. Bowen, L.J.

ment of the demised premises a matter which would affect or be affected by the enjoyment of other premises contiguous to it. It was all held under the same lessor. The contract was a simple contract for a sub-lease which was to contain the like covenants as were contained in the original lease, with nothing at all to turn you away from the groove into which Lords Justices *James* and *Mellish* went. But what have we here? We have a contract which first provides that the ordinary and customary covenants are to be contained in the sub-lease, and then that such other covenants are to be added as are contained in the original lease; we must then look at the covenants in the original lease to see what the parties are bargaining about. When we go back to the original lease we find a lease of houses which apparently formed part of what I may call a leasehold community, held under a common landlord, property which was parted out for enjoyment amongst the tenants of a great hospital, and we find provisions introduced into that lease such as that there shall be no nuisance, that there shall be no change in the elevation of the front, that there shall be arrangement of disputes not by the intervention of Law Courts, or by the intervention of ordinary arbitration, but by the intervention of a reference to the hospital, the landlord, who is presiding over this leasehold community. It seems to me that covenants of that sort are covenants which have to do with the mutual relations of those who are holding what you may call parts of a common estate. Looking from that point of view at the first of the three disputed covenants which it is sought to introduce, and the introduction of which is resisted by the Defendant, which is the most reasonable modification of the original covenant as to disputes to be introduced into this sub-lease—the modification which leaves out the original covenant altogether and gives no substitute at all (which is almost inconceivable), or a modification making Colonel *Haywood* arbitrator in the case of a quarrel between this sub-tenant and the original tenants of *St. Bartholomew's Hospital*, or a covenant making the hospital the arbitrators? The second scheme would be ridiculous, because if there was a dispute between the under-tenant and any of the tenants of the hospital it could not be decided by Colonel *Haywood*. It seems to me that the character of the head lease shews that the most reason-

able modification of that covenant would be one which made *St. Bartholomew's Hospital* still continue to be the arbiter in cases of dispute.

Then we come to covenants which are perhaps more difficult. The first question is as to the covenant not to assign. The Plaintiff says: "You must agree not to assign without consent of *St. Bartholomew's Hospital.*" The Defendant says, on the other side: "It is sufficient if I covenant not to assign without your consent. You cannot come to grief. If I assign without the consent of *St. Bartholomew's Hospital* that is no case of forfeiture against you." I do not say whether under the terms of the head lease it would be so or not, and I assume that it would not. But still it seems to me, in spite of *Williamson* v. *Williamson* (1), which I think we have distinguished sufficiently, that the reasonable modification of this covenant is, that the consent of *St. Bartholomew's Hospital* was to be obtained in case of further assignment made by the new sub-tenant, as well as the consent of his immediate lessor. There is moreover a provision in the original lease which looks as if the parties contemplated that under-leases might be made in this sort of form, for that lease provides that every license or consent should go only to the demise, lease, assignment, or transfer for which the same should be given, and should not exonerate the lessee, his executors, administrators, or assignees, or his or their under-lessee or under-lessees, from the necessity of procuring a similar license on any other future occasion.

With regard to the third covenant, as to the preparation of the mense demise by the solicitor to the hospital, I am of the same opinion. It would be difficult to distinguish the case on this point from *Williamson* v. *Williamson* were it not that this point is carried by the first covenant as to disputes, and by the whole character of the covenants.

Solicitors for Plaintiff: *Paines, Layton, & Pollock.*
Solicitors for Defendant: *Simpson & Cullingford.*

(1) Law Rep. 9 Ch. 729.

H. C. J.

C. A.
1885
Aug. 4.

In re ISAAC.
JACOB *v.* ISAAC.

[1885 I. 356.]

Practice—Married Woman suing without Husband or Next Friend—No Separate Estate—Security for Costs of Action—Married Women's Property Act, 1882, *s.* 1, *sub-s.* 2—*Rules of Supreme Court*, 1883, *Order* XVI. *r.* 16.

A married woman being empowered by sect. 1, sub-sect. 2, of the *Married Women's Property Act*, 1882, to sue as a *feme sole*, may sue without her husband or a next friend, and cannot be ordered to give security for the costs of the action, even although she have at the time of action no separate estate, and there be nothing upon which, if she fails, the Defendant can issue available execution.

By his will dated the 16th of March, 1849, *Michael Isaac* gave all his estate and effects to his wife, *Sarah F. Isaac*, his brother, *A. M. Isaac*, and others, upon trust for sale and conversion and investment, and to pay the income of the investments to his wife during her life for her separate use, and after her death it was his will that the trust moneys and income should be held in trust for his child, the Plaintiff (then *Henrietta Rose Isaac*), the principal to be assigned to her on attaining twenty-six, and not earlier. There was no direction that the daughter should have the property to her separate use.

The testator died on the 13th of November, 1858. The Plaintiff married in 1864, and is now the wife of *Samuel Jacob*. No settlement or agreement for a settlement had been made on or before or since the marriage.

The widow died on the 30th of September, 1884.

The Plaintiff brought this action, suing by herself without her husband or next friend, against the representatives of the acting executors of the will of her father and her husband, claiming a declaration that she was entitled in the events which had happened to the estate of her father to her separate use, and to have certain breaches of trust alleged to have been committed by the executors made good, and claiming in the alternative her equity to a settlement and administration of her father's estate.

Abigail Isaac, one of the Defendants, took out a summons

before *Bacon*, V.C., on the 29th of May, 1885, asking that the Plaintiff might be ordered to give security for the Applicant's costs of the action, and in the meantime that the action might be stayed.

By her affidavit the Applicant deposed that from information given to her by her late husband, the uncle and one of the guardians of the Plaintiff, and from inquiries which she, the Applicant, had lately caused to be made, she believed that the Plaintiff had no means for the payment of the deponent's costs of the action should she be successful in her defence, the Plaintiff not being possessed of or entitled to any property of any kind or description whatsoever.

Bacon, V.C., dismissed the summons, and the Applicant appealed.

Christopher James, for the Appellant:—

By Order xvi., rule 16, of the Supreme Court Rules, a married woman may sue as provided by the Act of 1882, and that Act by sect. 1, sub-sect. 2, provides that she may sue as a *feme sole*. The effect of the Act is to put a married woman in the same position as any other plaintiff, and the question to consider is, whether under the circumstances of this particular case a plaintiff would be ordered to give security for the costs of the action. A plaintiff is not ordered to give security merely because he is poor, but he would be when, as here, there is nothing upon which any available execution can issue.

In *Goodwin* v. *Archer* (1) the servant of the Genoese Ambassador was ordered to give security, because, although in the jurisdiction, yet, owing to his position, the defendant could not have issued execution against him.

So in *Harvey* v. *Jacob* (2), where a plaintiff was transported and his property was forfeited to the Crown, the Court ordered security for costs. *Redondo* v. *Chaytor* (3) is a different case, for there the Plaintiff was at the time of the application to give security residing in this country and under no disability.

If I can shew that, treating the present Plaintiff as a *feme sole*,

(1) 2 P. Wms. 452.

(2) 1 B. & Al. 159.

(3) 4 Q. B. D. 453.

C. A. 1885 *In re* Isaac. Jacob *v.* Isaac.

the Defendant can obtain no effective order against her to pay the costs if she is unsuccessful, then I submit the Court has power to order her to give security.

Oswald, for the Plaintiffs, was not called upon, but referred to *Threlfall* v. *Wilson* (1).

Cotton, L.J.:—

The difficulty arises under the *Married Women's Property Act*, 1882. Whether it would be well for the Legislature to make some provision that a married woman without separate estate should not be allowed to sue without her husband or a next friend, unless she gives security for the costs of the action, is not for us to consider. That must be left to the lawyers in Parliament. This Court must deal with the Act as it stands, and that Act does say in sect. 1, sub-sect. 2, that a married woman can sue as a *feme sole*. The Court never required a *feme sole* to give security for the costs of an action any more than any other plaintiff. Security for costs was required in the days when the person of the debtor could be seized, and if the Court thought that he was going abroad so that the defendant could not arrest him, then security was required. When the person of the debtor ceased so to be liable to arrest, the incidental remedy ceased also. Even assuming that it would be well if a general rule were laid down, that a married woman with no separate estate should be obliged to give security, it would, I think, be wrong now, upon the Act as it now stands, to require the Plaintiff to give security. The appeal must be dismissed.

Lindley, L.J.:—

I do not see how we can get out of the provisions of the Act. It is no doubt rather a startling result—a married woman who has no separate estate may be engaged in extensive litigation, and involve a defendant in a large amount of costs which the defendant may never be able to recover against her. But strange though the result may be, the Act is imperative.

Solicitors: *Joel Emanuel*; *Tamplin, Tayler, & Joseph.*

(1) 8 P. D. 18.

M. W.

C. A.
1885
Aug. 5, 6.

In re YOUNGS.
DOGGETT *v.* REVETT.

[1884 Y. 135.]

In re YOUNGS.
VOLLUM *v.* REVETT.

[1885 Y. 26.]

Appeal by Person not a Party—Rules of Supreme Court, 1883, *Order* XVI., *r.* 40—*Setting aside Judgment obtained by Collusion.*

D., the residuary legatee of Mrs. *Y.*, brought her action for administration of Mrs. *Y.'s* estate against *R.*, the surviving executor. Mrs. *Y.* had been the surviving executrix of her husband. *V.*, one of the residuary legatees of the husband, shortly afterwards brought her action against *R.* as sole Defendant, for administration of the husband's estate, alleging breaches of trust by Mrs. *Y.*, and asking administration of her estate if *R.*, as her representative, did not admit assets to pay what should be found due from her estate to the husband's estate. On the 28th of February, 1885, *V.* moved for judgment. There was no evidence before the Court that Mrs. *Y.* was indebted to her husband's estate, or that she had been guilty of wilful neglect and default. *R.*, by his counsel, admitted that she was so indebted, and he submitted to a judgment directing an account of personal estate of the husband which she had received, or but for her wilful neglect or default might have received, with an inquiry as to balances in her hands, and directing administration of her estate. It appeared that, from information *R.* had received, he felt sure that Mrs. *Y.* would be found a debtor to her husband's estate, and that wilful default would be established against her, and that it was not advisable to incur the expense of contesting these points at the hearing. *D.*, on the 26th of June, 1885, moved before *Pearson*, J., under Order XVI., r. 40, to discharge or vary the judgment of February, 1885. This motion was refused on the ground that *D.* had not been served with the judgment. *D.* appealed from this refusal and also applied for leave to appeal from the judgment:—

Held, that leave cannot be given to a residuary legatee to appeal from a decree made against the executor at the suit of a creditor, as the executor completely represents the estate for the purposes of such a suit, and the residuary legatee could not be made a party to the suit, and the case is quite different from one where leave to appeal is applied for by a person who, though not according to the present practice a necessary party to the suit, would have been a proper party to it:

Held, further, that the application of June, 1885, to vary the judgment was not supported by Order XVI., r. 40, the case not falling within that rule, which only applies to cases where service of an order is necessary

C. A.
1885
In re YOUNGS.
DOGGETT *v.* REVETT.
In re YOUNGS.
VOLLUM *v.* REVETT.

in order to make it binding, whereas here the order was binding without service, and *D.* was not a proper person to be served:

Held, further, that although *R.* might have acted injudiciously in submitting in February, 1885, to an order which went further than any order that could have been made adversely on the materials before the Court, the order could not be discharged unless the Court was satisfied that *R.* had submitted to it fraudulently in collusion with *V.*, and in this case the Court was satisfied that *R.* had acted *bonâ fide*.

NATHANIEL YOUNGS died in 1830, leaving a will by which he bequeathed his residuary estate equally among his children who should be living at his death. He appointed his wife, *Sarah Youngs*, *John Mills*, and *Edward Bartlett*, and another person executors. The will was proved in *England* by the widow and *Edward Bartlett*, and in *India* by *John Mills*. In November, 1853, the other executors being both dead, the will was proved by the widow in *India*.

Mrs. *Youngs* died in 1882, leaving a will by which, after giving certain pecuniary and specific legacies, she bequeathed her residuary estate to her niece *Jane Doggett*. She appointed *Revett* and *Biddle* her executors, and they both proved the will. *Biddle* died in 1884.

On the 3rd of July, 1884, Mrs. *Doggett* commenced an action against *Revett* for the administration of the personal estate of Mrs. *Youngs*. The statement of claim alleged that *Revett* had, by negligently and improperly signing certain cheques payable to bearer, enabled *Biddle* to obtain possession of sums forming part of the estate of the testatrix, which *Biddle* had afterwards misapplied, and that *Biddle* had recently died insolvent and had no personal representative. The object of the action was to make *Revett* liable for these sums as lost through his negligence, and to oblige him to pay over the residuary estate. *Revett* by his defence stated that persons claiming to be entitled to the estate of *Nathaniel Youngs* sought to make the estate of Mrs. *Youngs* liable in respect of their claims, and he submitted that he was entitled to have all such claims settled before the residuary estate of Mrs. *Youngs* was paid over.

On the 2nd of February, 1885, Mrs. *Vollum*, the legal personal representative of one of the children of *Nathaniel Youngs*, commenced her action against *Revett*, alleging that *Nathaniel Youngs*

had died possessed of considerable personal estate in *India*, the greater part of which was either received by Mrs. *Youngs* and misappropriated by her, or was improperly allowed by her to remain outstanding and was thereby lost. The Plaintiff, by her statement of claim, asked to have the personal estate of *Nathaniel Youngs* administered, to have an account taken of moneys received by *Sarah Youngs* as executrix and improperly retained or misappropriated by her, to have an account taken of moneys which but for her wilful default might have been received by her as executrix, and, if the Defendant did not admit assets of *Sarah Youngs* sufficient for payment of what should be found due from her, then to have her personal estate administered.

Revett, on the 20th of February, delivered his defence in *Vollum* v. *Revett*, by which he admitted the facts in the statement of claim other than the allegations as to the receipt and misappropriation of moneys by *Sarah Youngs* and her improperly allowing moneys to remain outstanding, as to which he admitted that the testator had personal estate in *India*, and that some part of it was received by *Sarah Youngs* as executrix, but stated that he did not know whether such personal estate was of large amount, or whether such part thereof as was received by *Sarah Youngs* was misappropriated by her, or was improperly allowed to remain outstanding and was thereby lost. There was no admission that *Sarah Youngs* was indebted to her husband's estate, nor any admission on which a judgment on the footing of wilful default could be founded. The Defendant did not admit assets.

On the 28th of February, 1885, Mrs. *Vollum* moved for judgment on the admissions in the statement of defence. On reading the pleadings and an affidavit of the Plaintiff filed on the same day an account was ordered of the personal estate of *Nathaniel Youngs* received by *Sarah Youngs* or any person on her behalf, or which but for her wilful neglect or default might have been so received, and an inquiry what balance of the residuary personal estate was from time to time in her hands, with a direction to charge interest on the balances. The ordinary account was directed of the personal estate of *Nathaniel Youngs* received by the Defendant. And the Defendant by his counsel admitting that the estate of *Sarah Youngs* was indebted in some amount to the estate of

C. A.
1885
In re YOUNGS.
DOGGETT *v.* REVETT.
In re YOUNGS.
VOLLUM *v.* REVETT.

Nathaniel Youngs and not admitting assets, an account was directed of the personal estate of *Sarah Youngs* which came to the hands of the Defendant.

The affidavit of the 28th of February, 1885, referred to in this judgment was an affidavit by Mrs. *Vollum*, for the purpose of shewing that *Sarah Youngs* was indebted to the estate of her husband, but it almost entirely consisted of statements made on information and belief.

Mrs. *Doggett* moved, in both actions, under Order XVI., rule 40, to discharge or vary this judgment. The motion was heard on the 26th of June, 1885, the ground relied on being that there was no evidence and no admission in the pleadings on which an order on the footing of wilful neglect and default could be founded. Mr. Justice *Pearson* refused the motion, on the ground, as it was stated, that Mrs. *Doggett* had not been served with the judgment, and therefore did not come within the rule. Mrs. *Doggett* gave notice of appeal from this refusal, and also applied *ex parte* for leave to appeal from the judgment of the 28th of February, 1885. The Court expressed great doubt whether she could appeal from it, but gave leave, *quantum valeat*, that the question might be fully argued.

On the appeal from the judgment being opened, *Cozens-Hardy*, Q.C., and *F. A. Lewin*, for Mrs. *Vollum*, took the preliminary objection that Mrs. *Doggett* could not appeal:—

This case is not within Order XVI., rule 40. That order was intended to apply to actions where some one was representing a class, or where persons who under the old practice before the *Chancery Amendment Act*, 1852, would have been made parties, were dispensed with. It has no application to a case like the present, where the only party who, according to the practice from time immemorial, could be made a party, was made defendant. Mrs. *Doggett* should have applied in her own action for leave to defend the second action in the name of the executor, but she cannot appeal from an order in that action. *In re Markham* (1) is no authority for allowing a residuary legatee to appeal from an order made in a creditor's suit. A decree against an executor may be

(1) 16 Ch. D. 1.

set aside by a residuary legatee on the ground of fraud: *Morrice* v. *Bank of England* (1); but nothing less will do.

Higgins, Q.C., and *Bradford*, for Mrs. *Doggett*:—

Bruff v. *Cobbold* (2) supports the right to appeal. The Court having taken possession of the estate will not deal with it in the absence of the party having the greatest interest in it. No doubt the general rule is that the executor represents the estate for all purposes as against creditors, and that the legatees are not to be present, but there is no rule preventing the Court from allowing them to be present if a special case is made. Our case is that the action of *Vollum* v. *Revett* was not *bonâ fide*, but that the executor played into the hands of the Plaintiff. The Court will deal with the matter under Order XVI., rule 40, and not put us to the expense of an action to impeach the judgment. The principle of the Court is that all persons interested should have an opportunity of being heard. *Williams* v. *Preston* (3) is an instance of relief being given on motion against a judgment.

COTTON, L.J.:—

This is a preliminary objection raising the question whether the Appellant can, by leave of the Court, appeal from a judgment in an action to which she was not a party, and which was instituted by a person claiming to be a creditor, against the estate the residue of which belongs to the Appellant. We are not at present dealing with the application to set aside the judgment as obtained by fraud.

The Appellant is the residuary legatee of Mrs. *Youngs*, whose executor is the Defendant in *Vollum* v. *Revett*. The testatrix was the personal representative of her deceased husband, so the Defendant represents both estates. The case made in that action is that the testatrix was indebted to the estate of her husband for moneys misapplied by her, and the Plaintiff, as interested in the estate of the husband, seeks to have the amount of the widow's liability established as a debt against her estate. To such an action no one could be a defendant but her personal representa-

(1) Cas. t. Tal. 217; 2 Bro. P. C. 465. (2) Law Rep. 7 Ch. 217.
(3) 20 Ch. D. 672.

C. A.
1885
In re YOUNGS.
DOGGETT *v.* REVETT.
In re YOUNGS.
VOLLUM *v.* REVETT.
Cotton, L.J.

tive. The case is quite different from a case where one of several *cestuis que trust* is suing a trustee, or where some persons are suing on behalf of a class. All the others could be made parties to the action, they stand on the same line as the parties who are suing, and if they consider the judgment erroneous they can on an application to the Court of Appeal obtain leave to appeal from it. Here the case is quite different. The legal personal representative of the testatrix was the only person who could properly be made party to the action, and there is no power to give to a person who could not be made a party to the action leave to appeal against the judgment. As regards the authorities, *Bruff* v. *Cobbold* (1) was a case where a suit was brought for distribution of a fund by one of a number of persons who claimed to be *cestuis que trust.* Another person who claimed to be a *cestui que trust,* and had not been made a party, was held entitled to appeal. He was a person who could properly have been made a party to the action. So in *In re Markham* (2) where the question was who were the persons entitled as residuary legatees under a will, leave to appeal was given to a person who claimed to be one of the persons entitled but had not been made a party. He was a person who claimed in the same right as the plaintiffs, and could have been made a party. It is said that this is a suit to administer the estate of the testatrix, and that therefore the persons interested in that estate ought to be present. But the administration is directed only for the purpose of paying creditors, no inquiries are directed by the judgment except such as are necessary for the purposes of a creditor's suit. It is true that the Applicant is interested in the estate, but the law throws on the executor the duty of protecting the estate from the claims of creditors, and it would be wrong to allow the residuary legatee to intervene, though the Court would have power to give her leave in her own action to defend the creditor's action in the name of the executor. What her remedy would be if judgment in a creditor's action were improperly obtained by the consent of the executor I do not say, but there no doubt would be a remedy. In *Williams* v. *Preston* (3), where a solicitor had put in a fraudu-

(1) Law Rep. 7 Ch. 217. (2) 16 Ch. D. 1.
(3) 20 Ch. D. 672.

lent defence to the prejudice of his client, the Court of Appeal held that there was jurisdiction to set aside the judgment.

LINDLEY, L.J. :—

This is a novel experiment, but it does not follow from its being novel that it cannot succeed. I am of opinion, however, that it cannot. The course which Mrs. *Doggett* has taken to get rid of the judgment in the second action is to appeal from it. This seems to me to be wrong. She is the residuary legatee of Mrs. *Youngs*, but has no interest in the estate of Mr. *Youngs*. Her interest in the second action is this, that if the Plaintiff in that action makes out that Mrs. *Youngs* administered her husband's estate improperly, Mrs. *Youngs*' estate may vanish. Mrs. *Doggett* tries to get rid of that judgment by appealing from it, but, for the reasons given by Lord Justice *Cotton*, I think that such an appeal is contrary to the practice of the Court and cannot be allowed.

The appeal from the refusal of the 26th of June, 1885, was then proceeded with.

Higgins, Q.C., and *Bradford*, for the Appellant :—

We apply to discharge or vary this order under Order XVI., rule 40, on the ground that it was not justified by the evidence before the Court, there being no proof of wilful neglect and default so as to justify an account on that footing. Mr. Justice *Pearson* refused our application simply on the ground that we had not been served with the judgment, but that the Plaintiff in the second action did not serve us, ought not to deprive us of any right.

[LINDLEY, L.J. :—I think it ought not, if Mrs. *Doggett* was a person who could properly be served, but it appears to me that she could not.]

Then we further rely on the ground that the judgment was collusive. The correspondence between *Revett* and Mrs. *Vollum's* solicitors leads to the conclusion that this was, in fact, an action got up by *Revett* to defeat Mrs. *Doggett's* action. The proceedings on their face shew collusion. The claim of Mrs. *Vollum* was one barred by acquiescence, *Sleeman* v. *Wilson* (1), and by the *Statute*

(1) Law Rep. 13 Eq. 36.

C. A. 1885

In re YOUNGS. DOGGETT *v.* REVETT.

In re YOUNGS. VOLLUM *v.* REVETT.

of Limitations: *Prior* v. *Horniblow* (1); yet the Defendant submits to a decree on the footing of wilful neglect and default without any evidence, and at the eleventh hour makes an admission by counsel that Mrs. *Youngs*' estate was indebted to that of her husband. A decree was taken which could not have been made if he had made default at the hearing.

COTTON, L.J.:—

We do not think that the case comes within Order XVI., rule 40, but we will hear the counsel for the Defendant on the question whether a case is not made out that the judgment was submitted to fraudulently, and whether in that case it ought not to be set aside, and liberty given to Mrs. *Doggett* to defend the second action in the name of the executor.

Everitt, Q.C., and *Herbert Smith*, for *Revett*:—

The correspondence between *Revett* and Mrs. *Vollum's* solicitors, when fairly examined, shews nothing in the nature of collusion. *Biddle* had been Mrs. *Youngs*' acting executor. *Revett* knew little about her estate, and nothing about her husband's, and when this is borne in mind it will be seen that he was, in the correspondence, honestly endeavouring to acquire information as to the claims made by Mrs. *Vollum* and another party, and he naturally wrote in a very different way from that in which an executor would write who had full materials for gaining information as to his testator's affairs.

[COTTON, L.J.:—Why did you submit to a judgment on the footing of wilful neglect and default, when none had been proved?]

Revett found that sums had been allowed by the widow to remain outstanding in such a way that there was no probability of escaping a decree on the footing of wilful neglect and default, and in his discretion he thought it would save useless expense to let the decree go in that form, which, after all, concludes nothing. So as to his admission that Mrs. *Youngs*' estate was indebted to that of her husband, he had good reason to believe that it was. He may have been guilty of an error in judgment, but that is no ground for setting aside the decree.

(1) 2 Y. & C. Ex. 200.

[COTTON, L.J. :—Certainly not. Fraud, in which Mrs. *Vollum* is implicated, is necessary.]

Then as to the *Statute of Limitations*—

[COTTON, L.J. :—You need not trouble yourself about that. An executor is not bound to set up the statute.]

[They were then stopped by the Court.]

Bradford, in reply.

COTTON, L.J. :—

This is an appeal by Mrs. *Doggett*, who is Plaintiff in an action against Mr. *Revett*, from the refusal by Mr. Justice *Pearson* of an application by her to discharge or vary a judgment obtained in an action by Mrs. *Vollum* against the same Defendant, Mr. *Revett*. Mrs. *Doggett* was the residuary legatee of the testatrix, Mrs. *Youngs*. Mrs. *Youngs* was the surviving executrix of her husband, so that her surviving executor, Mr. *Revett*, represents not only her but the original testator, Mr. *Youngs*. Mrs. *Vollum* makes a claim against *Revett*, as representative of Mrs. *Youngs*, in respect of the estate of the testator, Mr. *Youngs*, and charges Mrs. *Youngs* with having committed breaches of trust. Mrs. *Doggett* was residuary legatee under the will of Mrs. *Youngs*, but she had no interest under the will of Mr. *Youngs*. The action of *Vollum* v. *Revett* is not, as against the estate of Mrs. *Youngs*, in any way a *cestui que trust* action. It is simply an action by a creditor claiming against Mr. *Revett* as executor of Mrs. *Youngs*, on the ground that Mrs. *Youngs* was liable to Mrs. *Vollum* at the time of her death for breaches of trust committed.

The motion with which we have now to deal was put on two grounds. It was said that it came within the substance if not the actual terms of Order XVI., rule 40, which directs that in certain actions, and, amongst others, in an action to administer the estate of a deceased person, the Court may direct that any person interested in the estate shall be served with notice of the judgment or order, and that after such notice the persons served shall be bound by the proceedings in the same manner as if they had originally been made parties, and shall be at liberty to attend

C. A.
1885
In re YOUNGS.
DOGGETT *v.* REVETT.
In re YOUNGS.
VOLLUM *v.* REVETT.
Cotton, L.J.

the proceedings under the judgment or order, and that any person so served may within a month after such service apply to the Court or Judge to discharge, vary, or add to the judgment or order. It is said that Mr. Justice *Pearson* disposed of this case on the short ground that Mrs. *Doggett* had never been served, and therefore did not come within the terms of that order. In my opinion not only does she not come within the terms, but she does not come in any way within the substance of that order. If she were a person who ought under that order to have been served in order to bind her by the proceedings in *Vollum* v. *Revett*, the mere fact that there was default in serving her would not, I should think, deprive her of the right to interpose to vary the judgment. But in my opinion she is not such a person. The personal representative of a deceased person is, as against persons claiming to be creditors against the estate of the deceased, the person to represent the estate, and in any proceeding by a creditor the legal personal representative represents all persons beneficially interested in the estate other than the creditors. Any judgment against him at the suit of a creditor will bind those persons, because it binds the assets. In my opinion, therefore, this order has no application to the present case, as it only deals with cases where an order is to be served for the purpose of binding persons who would not be effectually bound unless they were so served. Therefore, not only on the question of form, but on the substance, the present case does not come within Order XVI., rule 40, and Mr. Justice *Pearson* was quite right in the view he took.

But another point, which was not argued at all before Mr. Justice *Pearson*, was argued before us, apparently with some reluctance, as if it was treading on dangerous ground, viz. that this judgment ought to be set aside on the ground that it was obtained by fraud—that is to say, that, by collusion between Mrs. *Vollum* and the Defendant *Revett*, this judgment, which could not properly have been obtained against the executor of Mrs. *Youngs*, had been by arrangement allowed to be taken, so as to bind Mrs. *Youngs*' estate. I put it in that way, collusion between Mrs. *Vollum* and *Revett*, because we are here asked to interfere with the rights of the Plaintiff in the case of *Vollum* v. *Revett*. The Plaintiff there has obtained a judgment beneficial to her,

giving her certain accounts and inquiries by means of which she may, if she succeeds in her evidence, establish a considerable claim against the estate of Mrs. *Youngs*, and the question we have to decide is not merely whether *Revett*, the executor, can be made liable on a breach of trust for allowing that judgment to go, but whether that judgment has been obtained under such circumstances that, not only as against *Revett*, but as against Mrs. *Vollum*, it is to be considered as a judgment which the Court ought not to allow to stand.

[His Lordship then examined the correspondence between *Revett* and Mrs. *Vollum's* solicitors, and stated his conclusion to be that *Revett* had satisfactorily explained it, and that it did not at all support the charge of collusion.]

Then as to the form of the judgment, it certainly struck me as remarkable that Mr. *Revett* should have been advised to submit to an account of this kind as regards the estate of a testator who died so very long ago, that he should have admitted inquiries as to wilful default, and that he should have admitted that something was due from the estate of Mrs. *Youngs*. We are not here to consider whether the solicitor or the counsel who advised Mr. *Revett* at the trial, or the Defendant who acquiesced in their advice, exercised a sound judgment in the course they took. What Mr. *Revett* tells us is this: "I found enough, in documents which were produced, to make me believe that £300, part of the estate of Mr. *Youngs*, had been received in the year 1878, and carried to Mrs. *Youngs'* banking account; and then that in the year 1880 a further sum of £80 had been remitted to her from *India*, and had been paid into her account." That being so, he formed the opinion that there would be certainly something due from Mrs. *Youngs* in respect of Mr. *Youngs'* estate, and considered it the best course to admit it at once.

Then as regards the inquiry as to wilful default. Such an inquiry cannot be obtained adversely unless one instance at least of wilful default is proved. In former days it had to be proved at the hearing, because no such inquiry could be added afterwards. At the present day the substance remains the same but the form is altered. If, in the prosecution of inquiries under an ordinary decree, facts come out which, if proved at the hearing, would have

C. A. 1885

In re YOUNGS. DOGGETT *v.* REVETT.

In re YOUNGS. VOLLUM *v.* REVETT.

Cotton, L. J.

enabled the Plaintiff to obtain then an inquiry as to wilful default, that inquiry will be added. But the rule still remains that an account on the footing of wilful neglect and default will not be granted until evidence has been given of at least one instance of wilful default. It may be that Mr. *Revett* and his advisers took an erroneous course. I do not say that they did; but the explanation given is that the Defendant had good reason to believe that these sums had been received at this long distance of time after the death of the original testator, and thought that if he contested the case of wilful default at the trial he would in all probability be beaten, so that the contest would only cause useless expense. In my opinion, therefore, the Defendant's submitting to a decree on the footing of wilful neglect and default is explained, so far as to get rid of any suspicion that he did so by collusion between him and the Plaintiff.

Then it is said that the Defendant allowed that to be read as evidence which was in no way evidence. I agree that the affidavit referred to in the judgment was in no way evidence which could have been properly received if it had been objected to, But is it to be said that the Defendant's allowing that affidavit to be read is, without anything further, sufficient evidence that this judgment was obtained by collusion between the Plaintiff and Defendant? In my opinion, no. It may have been an error of judgment of the Defendant to act so much as he did on his opinion as to what would probably be proved against him if he contested the action, but there is nothing shewing collusion between him and the Plaintiff.

It was urged that if the Defendant here had made default at the trial such a judgment would not have been given. I agree that the Defendant did submit to a decree which went further than any decree which could have been obtained if he had not appeared at the hearing. But the circumstances to which I have already adverted (whether they shew that he was taking a judicious course or no is another question) do in my mind entirely displace the case which the Appellant here must establish in order to induce us to set aside this judgment, viz., that there was collusion between the Plaintiff and Defendant. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. We have heard this case at great length, and I am glad we have done so, because I should be very sorry to have decided a point like this against the Appellant simply on a matter of form. In point of form Mr. Justice *Pearson's* view was technically right, but, if there had been a substantial case, that technical point could have been got over by giving leave to serve the decree on the present Appellant. But there is no substantial case, because she was not a person who ought to have been served.

The Appellant, however, makes a case which deserves investigation. She says, in substance: "I had an action against you, *Revett*, in which I was claiming the residue of Mrs. *Youngs'* estate, to which I was entitled, and, in order to diminish that residue and to make it disappear, you and Mrs. *Vollum* concocted a suit which was a conspiracy to cheat me, and you, *Revett*, have by collusion with the solicitors of Mrs. *Vollum* consented to a decree which robs me of every chance of getting a farthing." That is Mrs. *Doggett's* case, and it is one to be listened to. We have heard it fully argued, and it appears to me to be without foundation. [His Lordship here made some observations on the correspondence, and concluded by saying:—] I am satisfied that the inception of the action of *Vollum* v. *Revett* was as honest as any action could be, and there is not a shadow of pretence for saying it was a got-up scheme for cheating Mrs. *Doggett*.

Then it is said, assuming the action to be *bonâ fide*, *Revett* ought not to have consented to give Mrs. *Vollum* so favourable a decree as she has got. It may be that he has been injudicious in consenting to it. I will not say that he has. The result, perhaps, will shew. But bad judgment is quite a different thing from fraud and conspiracy to cheat. It may be that *Revett* was injudicious in allowing Mrs. *Vollum* to take an inquiry as to whether there had been wilful default. But that he, or rather his solicitor who had the conduct of this matter, thought that the point was not worth fighting, and that it was not right to put the estate of the testator to the cost of hostile litigation upon it, is perfectly plain, and in that view he took the course of consenting to the inquiry. Are we to be told that is proof of fraud and conspiracy,

C. A. 1885 *In re* YOUNGS. DOGGETT *v.* REVETT. *In re* YOUNGS. VOLLUM *v.* REVETT.

which is the ground upon which Mrs. *Doggett* has gone? It appears to me the more the thing is looked into the more the accusation vanishes.

Therefore, having heard the case on the merits, quite regardless of all technicalities, I think this appeal ought to be dismissed with costs.

Solicitor for Mrs. *Doggett*: *W. H. Roberts.*
Solicitors for Mrs. *Vollum*: *Pontifex, Hewitt, & Co.*
Solicitors for *Revett*: *Royle & Co.*

H. C. J.

C. A. 1885 *Aug.* 6, 7

In re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY.

Building Society—Borrowing Power—"Deposits on Loans"—Winding-up—Priority of Depositors—6 & 7 Will. 4, *c.* 32 [*Revised Ed. Statutes, vol. vii., p.* 1013.]

One of the rules of a benefit building society, formed under the Act 6 & 7 Will. 4, c. 32, provided that the society "is established for the purpose of raising by monthly subscriptions and deposits on loans a fund to make advances to members of the value of their shares, &c." Another rule provided that the directors should meet at specified times, "for the purpose of conducting the business of the society." A third rule provided that at the end of every five years a general account of the affairs of the society should be prepared, shewing the gross receipts and expenditure and liabilities, and that "if on taking the accounts there appears to be a deficiency of income, by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and be paid forthwith by such monthly or quarterly instalments as the directors shall determine":—

Held, that the first rule authorized the borrowing of money from persons not members of the society; that the second rule enabled the directors to exercise the power; and that the third rule did not enable the directors to pledge the individual credit of the members to the lenders of money to the society, but that, even if it did, and was thus *ultrà vires*, as being inconsistent with the nature of a building society under the Act, that rule might be rejected, leaving the borrowing power unaffected.

Held, that the lenders of money to the society were entitled, on its being wound up, to be paid out of the assets in priority to any of the members.

Decision of *Kay*, J., affirmed.

APPEAL from the decision of *Kay*, J. (1), that persons who had lent money to this society were entitled in the winding-up of

(1) 29 Ch. D. 182.

the society to be paid in priority to all the members of the society.

The society was established in 1865, under the Act 6 & 7 Will. 4, c. 32. The rules, which were duly certified, contained (*inter alia*) the following provisions:—

Rule 1. "The society is established for the purpose of raising by monthly subscriptions, and deposits on loans, a fund to make advances to members of the value of their shares, to enable them to erect or purchase one or more house or houses, or other freehold, copyhold, or leasehold estate, or on security of the like property to be mortgaged to the society, for the purpose of securing the monthly repayments and other payments prescribed by the rules of the society for the time being."

Rule 3. "The shares shall be £120 each. The value of a share at any date shall be as calculated in the tables hereunto annexed, subject to rule 81; and, for the purpose of enabling any person to take a part of a share, the shares shall be divisible in six parts."

Rule 4. "The subscription for each share be 10*s.* per calendar month; £3 per half-year (less 6*d.* discount); or £6 per annum (less 2*s.* 6*d.* discount), payable in advance. Members shall be allowed to pay up in one sum for any number of shares, or parts of a share, according to Table 1 annexed to these rules. The subscriptions shall be payable for the term mentioned in, and according to, the tables hereunto annexed, but subject to rule 81."

Rule 7 fixed the amounts of the fines for non-payment of the monthly subscriptions at the proper time, and provided that "when the fines on a share, on which no advance has been made, amount to 10*s.* 6*d.*, then the value of the share at the time of the last default (exclusive of the fines) shall be considered as a loan of that amount to the society, at 4 per cent. per annum, payable (less the fines) at any time after one calendar month's notice in writing from such defaulter, and when the amount of a share is turned into a loan as aforesaid, the defaulter shall cease to be a member of the society. But the directors, on the application of the member so making default, may in their discretion allow him to resume his membership, on such terms as they may deem expedient."

Rule 24. "The directors shall meet on the Wednesday next

C. A. 1885 *In re* Mutual Aid Permanent Benefit Building Society.

following each subscription meeting, or on such other day and at such time in each month, as they may appoint, (and oftener if necessary) for the purpose of conducting the business of the society."

Rule 80. "At the end of every five years (and oftener if necessary) a general account of the affairs of the society shall be prepared, shewing the gross receipts and expenditure and liabilities; and the surplus profits, after providing for all liabilities, shall be appropriated by the directors at a special meeting between the investing and borrowing members, by way of bonus, in equitable proportions . . . . If on taking the accounts there appears to be a deficiency of income, by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and be paid forthwith by such monthly or quarterly instalments as the directors shall determine; and any member making default in payment shall incur the same fines as for an equal amount of subscription or repayment in arrear, as the case may be. Any member having made the full payment or repayment on his shares, as specified in the tables annexed to these rules, shall remain in the society until he has made all such additional payments or repayments as the directors have prescribed, and, if he has mortgaged any property to the society for an advance on his shares, such property shall not be redeemed or redeemable until such additional subscriptions shall have been paid, unless the directors shall otherwise order. In the case of an unadvanced member, the directors shall have power, on his application, to deduct the gross amount of his proportion of loss from the amount payable to him, or on withdrawal."

Rule 81. "The directors shall have power to pay all the preliminary and other expenses connected with the formation of the society, and to apportion the expense in such manner as they may deem most expedient."

In September, 1865, the directors resolved to receive deposits of money on loan, and they afterwards received advances by way of loan from persons not members of the society. The winding-up of the society commenced in 1882, and the question arose whether the

persons who had made these advances were entitled to be paid in priority to the members of the society, including those who had given notice of withdrawal. Mr. Justice *Kay* held that the rules authorized the borrowing of money from outsiders, and that the lenders were entitled to priority over all the members.

The members appealed.

W. Pearson, Q.C., and *Seward Brice*, for the members :—

No doubt, a building society formed under this Act has power to borrow money from persons who are not members, if the rules authorize borrowing. But the authority must be express. Here rule 1 points only to payments made by members in advance on their shares. Moreover, the result of rule 80 would be to make the members personally liable to the lenders of the money. This would be inconsistent with the nature of a building society under the Act and *ultrà vires*, and would render rule 1, even if it does in terms authorize borrowing, also *ultrà vires* in that respect : *Murray* v. *Scott* (1). The effect would be to give an unlimited power of borrowing. If rule 1 was intended to authorize borrowing, it is strange that the subsequent rules contain no directions as to the mode in which the money borrowed is to be dealt with by the directors. The true construction of the rules taken as a whole is that no authority to borrow money is conferred.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the lenders, were not heard.

Hastings, Q.C., and *Grosvenor Woods*, for the liquidator.

LORD ESHER, M.R. :—

To my mind the only real questions in this case are, (1), whether, taking this to be a building society formed under the Act of 1836, rule 1, gave the directors power to borrow money ; and (2), whether rule 80, assuming that it is *ultrà vires*, is so connected with rule 1 as to render that rule also *ultrà vires*. It is said that the words "deposits on loans" in rule 1 do not give power to borrow money

(1) 9 App. Cas. 519.

C. A. 1885 *In re* Mutual Aid Permanent Benefit Building Society.

Lord Esher, M.R.

from persons not members of the society, but that they apply only to dealings between the members *inter se*,—to payments in advance upon shares. It is essential to the validity of such an argument to shew that the words can only apply to advances made in that way by members. But, when you see that the rule says that the society is established for the purpose of raising a fund "by monthly subscriptions and deposits on loans," it seems to me that the words cannot be limited in that way. What is a "deposit on loan" but a lending of money? It seems to me that the words must include borrowing by way of loan. Then it is said that rule 80 authorizes the directors to pledge the credit of each individual member of the society for the debts of the society, and that each member would become personally liable to the lenders of the money. I do not think rule 80 enables the directors to do anything of the sort, and they have not attempted to do it. But, suppose rule 80 does authorize the directors to pledge the individual credit of the members, then the argument is, that rule 80 is *ultrà vires*, and that consequently rule 1 is *ultrà vires*. But are the two rules so necessarily connected together that the one must fall with the other? I think they are not. I think you may well cut out and reject rule 80, leaving rule 1 standing. On every ground I think the decision of Mr. Justice *Kay* was right, and that the appeal must be dismissed.

Baggallay, L.J.:—

I am of the same opinion. I think a power to borrow is conferred by rule 1, because it is stated to be one of the objects of the society to raise a fund "by monthly subscriptions and deposits on loans." Then it is said that the rules do not authorize the directors to exercise this power. But the powers of the directors are to be ascertained from the rules and from the general scope of the rules. When you find that rule 24 says that the directors are to meet at specified times "for the purpose of conducting the business of the society," and that part of the business of the society is to raise money by loans, it follows that the directors, who are to conduct the business of the society, must have the power of raising money accordingly. What, then, is the limitation of the power of borrowing of a society of this kind? This question was discussed

by the House of Lords in *Murray* v. *Scott* (1), and it was pointed out that the only limitation to be implied is that necessary limitation which is derived from the fact that a building society is created by statute, and that its purposes and powers are created by statute. Therefore, the powers must not be exercised in such a way as, to render the society a different thing from a benefit building society formed for the purposes and in the manner defined by the Act. Both Lord *Selborne* and Lord *Blackburn* gave illustrations of powers which might be inconsistent with the Act. Lord *Selborne* said (2): "The power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purposes and in the manner defined by the Act. It might have that effect if the rule authorized borrowing, or the use of money borrowed, for purposes other than those of a benefit building society as so defined; or, if it enabled the trustees or directors to pledge the credit of the individual members of the society without limit in a manner inconsistent with the limitation of the value and amount of the shares and subscriptions by which the common stock or fund of the society was to be raised as prescribed by the Act." In either of those cases there would be something inconsistent with what you must infer from the nature of the society to be the limitation of the power of borrowing. In the present case a power to borrow is given. Where do you find anything to make it *ultrà vires?* There is nothing, unless it can be extracted from rule 80, to shew that it is like either of the illustrations given by Lord *Selborne*, or to shew anything inconsistent with the Act. But rule 80 has nothing to do with the borrowing power, and it gives no authority to the directors to pledge the individual credit of the members. It in no way regulates the exercise of the borrowing power, but it simply prescribes the way in which the members are to contribute *inter se* towards making good the deficiency of the income of the society for the purpose of satisfying its liabilities. Even if an outside creditor could enforce contribution from members under rule 80, the persons who lent their money did not lend it on the faith of any unlimited liability of the members.

(1) 9 App. Cas. 519. (2) 9 App. Cas. 538.

C. A. 1885

In re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY.

FRY, L.J.:—

I am of the same opinion. The first question is whether the rules confer a power to borrow. In my judgment there can be no doubt that they do. The other suggested construction of rule 1 is so forced that it cannot prevail. I think, also, that rule 24 requires the directors to carry into effect all the purposes of the society, and confers on them all the powers which the society itself possesses. Then arises the question, whether the power to borrow is invalid by reason of its so altering the nature of the society as to make it something different from a benefit building society as defined by the Act. I cannot see anything of the kind. It is said that indirectly the power has this effect, because, combined with rule 80, it enables the directors to pledge the individual credit of the members to the lenders of money. It is said that rule 80 creates a general liability of the members to all the creditors of the society. I do not think that is the true construction of rule 80. I think it creates nothing more than a liability of the members *inter se* to contribute to the assets of the society. If it goes further than that it is *ultrà vires*, but the power to borrow is unaffected by it.

Solicitors: *W. Compton Smith; Speechly, Mumford, & Landon; Bolton, Robbins, Busk, & Co.*

W. L. C.

In re THOMPSON.

C. A.
1885
V.-C. B.
June 19.
C. A.
Aug. 6, 8, 11.

Solicitor and Client—Bill of Costs—"Delivery" of Bill—Condition—Withdrawal—Delivery of Second Bill—Taxation, Common Order for—Practice—Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 37 [*Revised Ed. Statutes, vol. ix., p.* 128].

A solicitor may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully and clearly stated to the client: but if the solicitor has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill.

A firm of solicitors, on being pressed by their clients to send in their bill of costs, delivered a bill accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though, if such sum was not paid within eight days, they reserved to themselves the right to withdraw the bill and deliver another. The clients, however, insisting on being furnished with the particulars of further charges, the solicitors wrote withdrawing the bill. The clients then obtained a common order for taxation of that bill, and for delivery and taxation of a further bill.

On motion by the solicitors, *Bacon*, V.C., discharged the common order on the ground that no bill had been "delivered" within the meaning of sect. 37 of the *Solicitors Act*, 6 & 7 Vict. c. 73; but ordered the solicitors to deliver a bill within fourteen days, such bill to be taxed.

The solicitors, in pursuance of that order, delivered a second bill, but of a considerably less amount than the first, whereupon the clients appealed to reverse that order and to have it declared that the bill to be taxed was that first delivered:—

Held, by *Cotton* and *Lindley*, L.JJ., discharging the last-mentioned order, that the first bill was conditional, but that the condition was one which a solicitor could not impose on his client, and that therefore the original common order for taxation must stand.

Held, also, that the clients should under the circumstances, instead of obtaining the common order to tax, have obtained a special order on petition raising the question as to the right of the solicitors to withdraw their bill: they were therefore allowed no costs of the proceedings in the Court below, but only the costs of the appeal.

APPEAL from order of Vice-Chancellor *Bacon*.

Messrs. *Thompson*, a firm of solicitors at *Workington*, had acted as the solicitors for a Miss *Moordaff*, the Defendant in a probate action of *Burgoine* v. *Moordaff*, which commenced in February, 1881, and terminated in November, 1883. Miss *Moordaff* died

C. A. 1885 *In re* THOMPSON.

during the progress of the action, having appointed Messrs. *Haythornthwaite* and *Fell* her executors, who continued the defence in the action, Messrs. *Thompson* still acting in the matter as their solicitors.

Several applications having been made by the executors to Messrs. *Thompson* for delivery of their bill of costs in the action, but without result, the then solicitors to the executors wrote on the 29th of April, and again on the 1st of May, 1885, requesting Messrs. *Thompson* to deliver their bill at the earliest convenience in order that the trust accounts might be completed. On the 6th of May, 1885, Messrs. *Thompson* sent their bill to the executors' solicitors. The bill, which on account of a change in the firm had been made out in two separate parts, amounted to £4304 9*s.* 2*d.* The bill was not signed by the firm, but was accompanied by a letter from them of the same date, in which—after stating that, at the urgent request of and to accommodate the executors in passing their legacy duty accounts, they had at no small inconvenience hastened the bill to a conclusion, but that the costs of and incident to one of the bundles of papers could not in the short time allowed them be included in the bill—they said, "We are, however, willing to accept payment of the balance of these bills, namely, £768 1*s.* 6*d.* in full discharge, if payment of that amount is made to us within eight days from this date; if not, we reserve to ourselves the right to withdraw the accompanying bills and deliver others which will in all probability shew a much larger balance against the executors, and the preparation of which must, as you may readily conceive, occupy a considerable time and thus cause still further delay."

On receipt of the bill the executors' solicitors wrote to Messrs. *Thompson* requesting particulars of any other claims against their clients, saying that, being merely executors, they could not deal with part of an account. Messrs. *Thompson*, however, replied that as the executors had pressed for the bill, they Messrs. *Thompson*, held them to the terms on which it had been delivered and which were embodied in the letter of the 6th of May, but that they would not make any claim beyond the bill sent if payment of the balance was made according to that letter. The executors' solicitors still insisting that if Messrs. *Thompson* had any further

account to render it should be furnished without delay, Messrs. *Thompson* wrote on the 14th of May, 1885: "These bills not having been discharged we beg to withdraw the same in accordance with our letter to you of the 6th inst. and upon the terms therein referred to. Please return same to us in order that we may substitute others accordingly."

The executors did not, however, return the bill, and on the 19th of May, 1885, obtained an order of course against Messrs. *Thompson* for delivery within a fortnight of a further bill of costs and for taxation of the bills already delivered and to be delivered.

Messrs. *Thompson* then moved to discharge that order for irregularity, on the ground that the bill was only delivered conditionally and was not therefore liable to taxation, and that the order omitted to state the circumstances attending the delivery and withdrawal of the bill.

The motion was heard before Vice-Chancellor *Bacon* on the 19th of June, 1885.

Marten, Q.C., and *Warrington*, for the motion.

Millar, Q.C., and *Ashton Cross*, for the executors:—

A solicitor cannot withdraw a bill of costs once delivered; for having delivered it he must abide by it: *In re Heather* (1); *In re Carven* (2); *In re Holroyde* (3).

BACON, V.C.:—

The question here is, whether a bill of costs has been delivered. Nothing is more clear than that the *Solicitors Act*, 6 & 7 Vict. c. 73, requires a solicitor to deliver his bill and sign it if he wishes to sue upon it saying, "This is my bill." Has that anything to do with the case before me? The solicitors here are required to deliver their bill, and they write saying, "Time presses; we have made a bill; a part of it is totally imperfect and incomplete, but we will not delay to comply with that request because of that imperfection; and we offer, if you will pay a certain amount, to abide by the bill imperfect as it is." And in

(1) Law Rep. 5 Ch. 694. (2) 8 Beav. 436.
(3) 29 W. R. 599.

C. A. 1885 *In re* THOMPSON. V.-C. B.

the same letter, not having said, "This is our bill," but having said in very distinct terms, "This is not our bill," they claim the right, if their offer is not accepted, to withdraw the bill and to present a perfect bill.

The question is whether, under these circumstances, a client is at liberty to apply, under the general provision of the statute, for the common order to tax that bill as a bill which has been delivered. The letter I have referred to was written on the 6th of May. On the 14th of May, a week and a day afterwards, the solicitors revert to their original offer and say, "We desire to withdraw the bill." Can it be said that the bill was ever delivered when, upon the face of it, they say, "This bill is wholly imperfect and is not made out?" In my opinion it would be misconstruing the statute to say that the bill was delivered on the 6th of May, or at any other time after the 6th of May. I quite recognise, and let it be understood I do not entertain any doubt of, the principle which is contained in the cases Mr. *Millar* has referred to—that a solicitor is not at liberty to present a bill and then afterwards withdraw it with the intention of making out a larger bill; but here the very essence of the transaction is this: the solicitors say "this is a bill which is imperfect; it is not the bill we have a right to bring against you: if you will pay us £768 now we will treat it as if it was a perfect bill; but if you do not accept that offer, then we desire to have the bill back"—for what purpose?—"not that we may change it but that we may make that perfect which is imperfect."

Asking myself the only question I have to consider, namely, has any bill been "delivered" within the meaning of sect. 37 of the statute? I say I cannot find that any such bill was ever delivered. I think, therefore, that the common order to tax cannot, under the circumstances that have taken place, be allowed to stand, but that the solicitors must be at liberty and ought now to undertake to deliver a proper bill.

His Lordship then made an order discharging the order of the 19th of May, 1885, and directing Messrs. *Thompson* to deliver a bill within fourteen days, such bill to be taxed, the costs of the present motion to abide the result of the taxation.

C. A. 1885 *In re* THOMPSON.

In pursuance of that order Messrs. *Thompson*, on the 21st of July, 1885, delivered an amended bill, again in two parts, amounting to £3485 4*s.* 7*d.*, or £819 4*s.* 7*d.* less than the first bill; whereupon, on the same day, the executors served Messrs. *Thompson* with notice of appeal to have the Vice-Chancellor's order reversed, and to have it declared that the bill to be taxed was that first delivered. It appeared that in the second bill Messrs. *Thompson* made several considerable reductions for expenses out of pocket, in some instances from £30 to less than £10.

C. A.

The appeal came on for hearing on the 6th of August, 1885.

Millar, Q.C., and *Ashton Cross*, for the Appellants, the executors:—

There was no agreement or condition here that the solicitors should have liberty to send in another bill. It is not the case of a solicitor having sent in a bill hurriedly as best he can, saying that he will have to furnish further particulars; but it is simply a case of a solicitor endeavouring to get out of his client as much as he can, and then, on finding that his client objects to and intends to tax the bill sent in, attempting to evade taxation by withdrawing his bill and sending in another. This, however, is what a solicitor may not do: *In re Carven* (1); *In re Heather* (2).

[COTTON, L.J.:—In *Re Chambers* (3) Lord *Romilly* seems to have decided that a solicitor, after delivering his bill, may, before being served with an order to tax, withdraw it and send in another of a reduced amount.]

That case, which is reported elsewhere (4), was discussed in *In re Holroyde* (5), where the late Master of the Rolls pointed out that Lord *Romilly*, without laying down any general principle, only decided that there may be special circumstances entitling a solicitor to withdraw his bill. If a solicitor sends in a bill at the same time naming a smaller amount which he will accept in discharge, taxation must proceed as on a bill for the larger amount: *In re Carthew* (6). Here, when the solicitors saw that there was

(1) 8 Beav. 436.
(2) Law Rep. 5 Ch. 694.
(3) 34 Beav. 177.
(4) 5 N. R. 298; 13 W. R. 375.
(5) 29 W. R. 599.
(6) 27 Ch. D. 485.

C. A. 1885 *In re* THOMPSON.

going to be a taxation they reduced their bill by upwards of £800. It is the very case covered by the authorities.

Marten, Q.C., and *Warrington*, for the Respondents, Messrs. *Thompson*:—

There was no "bill delivered" within the meaning of sect. 37 of 6 & 7 Vict. c. 73, which requires that the bill shall be either signed by the solicitor, or inclosed in or accompanied by a signed letter "referring to such bill." It is true that the bill is referred to in the letter of the 6th of May, but only as a conditional bill, and a conditional bill cannot be a "bill delivered." The executors not being bound to accept the bill subject to the condition should have sent it back. There was no suggestion or threat of taxation before we withdrew the bill. *Re Chambers* (1), which is in our favour, was even a stronger case than this, for there the solicitor, before substituting another bill, had admitted that there were some charges in the first bill which could not be sustained on taxation, and yet taxation was ordered to proceed upon the substituted bill. It has never been held that a solicitor cannot deliver a conditional bill; no doubt he cannot, after delivering a bill—a statutory bill—add a condition to it. What we said was, "This is not our bill under the statute; take it or give it back."

In re Heather (2) is distinguishable, for there there was a complete delivery of the bill; the bill was looked over by the client's advisers, who suggested various items of overcharge and sent it back to the solicitors for corrections only and with no waiver of the original delivery. In *In re Holroyde* (3) there was also a complete delivery. We submit that the order appealed from was perfectly right, and inflicts no hardship upon the Appellants. The common order to tax was clearly irregular. The executors should have proceeded on petition stating the facts.

Millar, in reply:—

It would be entirely contrary to public policy and to the principle laid down by the authorities to hold that a solicitor who has

(1) 34 Beav. 177. (2) Law Rep. 5 Ch. 694.
(3) 29 W. R. 599.

sent in his bill in answer to repeated applications is entitled to send it subject to a condition that it shall not be taxed. The substitution by a solicitor of an amended bill on receiving notice from his client that the first bill will be taxed is "just the device the law will not permit him to try on": *per Jessel*, M.R., in *In re Holroyde* (1). A solicitor cannot take advantage of the fact that he has not signed the bill sent in to his client: *In re Pender* (2).

1885. Aug. 11. COTTON, L.J.:—

This is a case of considerable importance to the parties as regards the question of costs, and it is of considerable importance to the public as regards the conduct of solicitors and the restrictions which ought to be imposed upon them so as to prevent any unfair advantage being taken by them in their charges against their clients.

The facts of the case are these. The clients here, the Appellants, were executors: they employed Messrs. *Thompson*, the Respondents, as their solicitors, and they pressed for some time to have the bill of costs in order that they might prepare and pass their residuary account. After letters had been sent to Messrs. *Thompson* by the solicitors then acting for the executors, a letter was, on the 6th of May, 1885, written by Messrs. *Thompson* sending a bill of costs. That letter I shall have to deal with more particularly presently: it is sufficient now to say it mentioned that the bill did not include charges for all matters. Some correspondence then took place, the solicitors acting for the executors saying that they must have all the charges at once; but they did not return the bill. Then subsequently, on the 14th of May, Messrs. *Thompson* withdrew the bill which they had sent in. On the 19th the executors obtained the common order to tax, with this addition, that the solicitors were to send in a further bill for matters not charged for in the former bill. Then there was a motion by Messrs. *Thompson* to discharge that common order, and Vice-Chancellor *Bacon* made an order on the 19th of June discharging that common order, and directing the solicitors to send in a bill. He then gave the usual directions as to taxation, but he did not make the executors who obtained the common order

(1) 29 W. R. 599. (2) 8 Beav. 299.

C. A. 1885

In re THOMPSON.

Cotton, L.J.

to tax pay any costs. Against that order of Vice-Chancellor *Bacon* the executors have appealed to us.

Now, it has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation. The rule has been carried so far that even where objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items, the Court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended. That was so decided in *In re Heather* (1).

But, then, in this case, it is said by the solicitors: "We sent our bill in under a condition that if it was not paid within eight days we should be at liberty to withdraw it; it was not paid and we withdrew it, and sent in this new bill."

Now, there has never been such a case as that in the various cases which have been reported as to taxation. All the cases in which the Court has refused to allow a solicitor to vary by diminishing his bill after he has once sent it in were cases in which the bill had been sent in unconditionally, and had been really a delivered bill. The present case is, so far as counsel have been able to assist us, and so far as one can see from looking at the cases, the first which has arisen in which it has been alleged that the bill was originally sent in subject to a condition.

The first question to be considered is, whether or no the solicitors are right in saying that the bill was delivered subject to a condition. The letter of the 6th of May, 1885, written by the solicitors, is as follows:—[His Lordship read it, and continued.] Now, it is said on behalf of the executors that that is no condition at all; and that if it is a condition, it is only a condition that they were to be at liberty to add further items to this bill; but in my opinion there is a condition here. It is this:

(1) Law Rep. 5 Ch. 694.

"If you pay within eight days the amount which we shew to be due to us, and claim to be due to us, then we will accept it in full discharge; but if not, then we will withdraw the bill." That is the condition subject to which this bill is sent in. In my opinion the proper course for the solicitors who were then advising the executors to adopt would have been at once to send back that bill, saying, "We will have nothing to do with it; we will not take a bill on such conditions; we require you to send in your bill without any stipulation, and then we will deal with it in the way in which a bill ought to be dealt with." But that was not the course adopted. As Messrs. *Thompson* claimed a right to withdraw the accompanying bill and deliver another, and did not simply claim a right to add charges thereto, in my opinion there is here simply a condition that, "If you do not pay the bill within eight days, it is to be considered as not delivered and to be withdrawn."

That, then, is the condition; and if anything—a bill of exchange or money—is sent to a person on a condition, he must either take it subject to that condition, or not take it at all. He may send it back and say, "I will not accept it on such a condition;" but if he does accept anything subject to a condition, then his acceptance is subject to that condition which was imposed when it was sent to him.

It was urged by the executors, "We never agreed to anything of this kind." It is true they never did. The evidence does not shew that they did, but they took the bill on the condition stated; and taking it on that condition, if the condition is a lawful one, it cannot be said that they took it otherwise than subject to the consequences of that condition. What they did was to get the common order to tax, although before that was done the solicitors said, "As the condition has not been performed we will withdraw the bill and send another."

But then we have to consider this, whether such a condition as that is one which can lawfully be imposed by solicitors on sending a bill. It was urged on behalf of the executors, the Appellants, that the condition really reserved, assuming it was effectual, a right to the solicitors to send in, in the first instance, a bill with charges that might not be supportable on taxation, and then, if that was not paid, or if there was shewn an intention to tax

C. A. 1885 *In re* THOMPSON. Cotton, L.J.

and question the amount of the bill, to send in a different bill which would stand taxation. What, then, we have to consider here for the first time, is whether such a condition as this can be reserved in a letter sending a bill of costs.

Now, as I have already mentioned, if the bill is sent without any condition attached to it, the solicitor may sometimes, on application to the Court, be allowed to correct mistakes, though, in one case, *In re Carven* (1), the Court refused to allow him to diminish the charges which he had made so as to avoid the consequences of taxation. He has, however, been allowed to send in a bill correcting mistakes of omission of further charges. The common order here does, as I have mentioned, allow additions to the bill; but the principle upon which the Court has always refused to allow a solicitor to alter or withdraw from bills of costs which have been once sent in by him without condition, is this, that it would open a door to fraud and would enable solicitors who are intending to act fraudulently towards their clients to send in an excessive bill, and a bill which they knew they could not support. It would, I think, be wrong to say that a solicitor who sends in his bill subject to a fair condition, and one which we ought to hold lawful, is not entitled to do so just as much as anyone else might be entitled to send either money or securities on a condition: but such a condition as we find here is not one which ought to be allowed, nor one which a solicitor can impose upon his client. If a solicitor were to send a bill to his client and to say, "Here is a bill which contains charges which I cannot sustain on taxation, or which it is probable I should not be able to maintain on taxation; they are sums for work done which are not allowed on taxation;" or if in any other way he were fairly to state to his client that there were charges in that bill which the client could not be forced to pay, and was not bound to pay, but which represented work fairly done; and if, therefore, the solicitor sent his bill, with a suggestion that these charges should be paid, and said, "If you do not like to adopt this bill after what I have told you, then I will send in a bill which will include those charges which will bear taxation and which I can enforce against you"—if a condition were expressed

(1) 8 Beav. 436.

in those terms it would, in my opinion, be in no way contrary to the rules which the decisions of this Court have imposed on solicitors in their dealings with their clients: and if a client were to take the bill under those circumstances, he must take it subject to that condition. If the client took the bill but refused to assent to the condition, then the solicitor, having fairly stated the condition to the client, would be at liberty to say, "That was a condition which I might lawfully make; the client took the bill on that condition, and that condition not having been assented to, I am entitled to send in another bill." But that assumes that the solicitor has stated that to his client which will prevent such a condition being made use of for fraud. Does, then, the condition in the present case fairly state to the client what I say ought to be stated to him to make it one which a solicitor can impose?

Looking at the terms of the letter of the 6th of May, the solicitors do not say that the bill sent is one which the clients are not bound to pay unless they are minded to deal liberally with the solicitors, but the letter represents the bill as one the balance of which, £768 1*s.* 6*d.*, is due to the solicitors, without any modification or statement that it is not what they can enforce against the client.

So far from their representing that this bill was one which could not be enforced, or that there were charges in it which could not stand on taxation, the solicitors add: "In all probability if you do not do this, we shall make heavier charges against you." Now, in my opinion, the condition in this letter is not a condition fairly expressed so as to make it one which the solicitors could impose on their clients. It appears to me, therefore, that the solicitors must stand by that bill which they first sent in. They tried to impose a condition in such terms as not fairly to state to the client what they desired to do, or what the effect of that bill and of the charges in it was.

I hold, therefore, that although there was a condition attached to this bill when delivered, it was ineffectual; that the order of the Vice-Chancellor must be discharged; and that the original order for taxation must stand.

I should add that, in my opinion, the common order to tax was

C. A. 1885 *In re* THOMPSON. Cotton, L.J.

not the right form of proceeding for the solicitors to the executors to adopt in the case. What they ought to have done was to have fairly stated the facts. When they obtained that order Messrs. *Thompson* had in fact sent a letter withdrawing or purporting to withdraw the bill they had sent in; this, I think, ought to have been stated, and the solicitors to the executors should not have gone on to take the common order to tax, but should have obtained a special order on the Court being informed of all the circumstances of the case. That probably would have prevented a great deal of this litigation. As the order was not in the proper form there ought to be no costs of the proceedings before the Vice-Chancellor; but as the executors, the Appellants, have succeeded they must have the costs of this appeal. The costs of the taxation will, of course, be according to the Act of Parliament, unless the master thinks fit to state any special circumstances. It may be that the bill of the solicitors first sent in was one which by carelessness or otherwise, or by mistake of some clerk, was sent in in that form; but it is a startling fact, and one which makes me doubt the honesty of the solicitors in these proceedings, that in that first bill there are charges for expenses out of pocket amounting to large sums, and in the bill which they sent in under the order of the Vice-Chancellor those sums are very considerably reduced, in some cases from £30 to less than £10. That does throw the greatest possible suspicion on the honesty of the proceedings: but I do not in any way rely on that in dealing with the question which we now have to determine; I decide it simply on the form of condition not properly stating to the client that which, to make it effectual, ought to have been stated.

LINDLEY, L.J.:—

In this case I have very carefully gone through the correspondence and listened to the arguments addressed to us on both sides, and I have come to the conclusion that the condition which Messrs. *Thompson* sought to impose by their letter of the 6th of May, 1885, was not expressed in such language as to be binding on the client. I do not mean to say for a moment that bills cannot be sent in subject to a condition, but underlying that there is this—that a solicitor must deal fairly with his client;

C. A.
1885
In re
THOMPSON.
Lindley, L.J.

and I am satisfied (and I say it with regret) from the evidence in the case, and the tone of the correspondence, that this was a catching and not a fair condition. Messrs. *Thompson* knew, so far as I can see from the evidence, that that bill was not an honest bill—not a bill by which they were prepared to stand at all. It was not a bill as to which they could safely or fairly say to their client, "This is our bill made up to the best of our ability; it contains charges which you may pay if you are disposed, but which we tell you frankly we are not prepared to maintain." Any honest disclosure of that sort would have made all the difference in the world; but when we find that the contrary was the fact, and that the bill was one which they must have thought or hoped would be treated by the client as fairly made out—when it was not—it appears to me that they have not fulfilled their obligation as solicitors to their client, in expressing the condition in the language which they did.

I will not refer closely to the correspondence, but I cannot help seeing that there is bad feeling on the part of Messrs. *Thompson* at the bottom of it; there can be no question at all about that; but when we look at the pure question of law, "Had they, or had they not, a right to impose such a condition?" I say "Yes," if they acted fairly, "No," if they acted otherwise, which, in my opinion, they did.

Now, the common order to tax appears to me to have been wrong, for this reason: that I do not think anybody is entitled to get a common order to tax when the effect of it is to make him a judge in his own case of the matter in dispute. Messrs. *Thompson* maintained they had a right to withdraw that bill: the clients afterwards maintained the contrary. That is a matter in dispute which ought not to have been laid aside and prevented from being discussed by the simple order to tax. The proper way would have been to have presented a petition raising the point, and to have let the Judge say which party was right. Therefore the common order to tax appears to me to have been wrong. Then the question is, what is to be done? The justice of the case will, I think, be met in this way: the order to tax having been improperly obtained, we give no costs of that proceeding—though, at the same time not allowing it to be supposed that a

C. A. 1885 *In re* THOMPSON.

condition of this sort can be imposed in such language as this—and we allow the appeal, with costs to be paid by the Respondents.

Solicitors: *Speechly, Mumford, & Landon; Bell, Brodrick, & Gray.*

G. I. F. C.

C. A. 1884 SMITH, J. *Dec.* 10. 1885 V.-C. B. *July* 29. C. A. *July* 30; *Aug.* 1, 11.

EDWARDS *v.* DENNIS.

[1884 E. 309.]

In re EDWARDS' TRADE-MARK.

[1885 E. 667.]

Trade-mark—Registration for entire Class—Five Years' Registration—User for part of Class only—Exclusive Title for Entire Class—Assignment—Goodwill—Action—Infringement—Rectification of Register—Limitation to Part of Class—Trade-marks Registration Act, 1875, *ss.* 2, 3, 4, 5, 10—*Trade-marks Registration Amendment Act*, 1876, *s.* 1.

An assignee of the goodwill of a business with the right to a trade-mark which has been registered by the assignor under the *Trade-marks Registration Act*, 1875, in respect of an entire class, but of which the articles dealt with in such business form part only, is not entitled to the exclusive user of the trade-mark for the entire class, but only for the particular articles in connection with which it is actually used, even though the trade-mark may have been on the register for five years.

Sects. 3 and 4 of the *Trade-marks Registration Act*, 1875, do not confer on the first or subsequent registered proprietor of a trade-mark who has been on the register for five years the absolute right to the exclusive use of his trade-mark as against all the world: the intention of the sections is merely to afford him assistance in bringing an action for infringement by dispensing with the necessity of his adducing evidence in that action of exclusive user; and the sections are no bar to an application under sect. 5 to rectify the register on the ground that the trade-mark is improperly on the register or should be restricted to certain goods.

Semble, it is not the intention of the Act that a man registering a trade-mark for an entire class, and yet only using it for one description of goods in that class, shall be able to claim for himself the exclusive right to use it for every description of goods in that class. If he desires to extend his business and apply his trade-mark to a new description of goods in the class, he should have his trade-mark registered in respect of those goods.

Quære, whether a man can claim the exclusive use of a registered trade-mark not in actual use in connection with particular goods at the time of registration.

In 1883 *E.* purchased and took an assignment of the goodwill of the

business of an iron merchant and manufacturer, and also of the right to a trade-mark, consisting of a device of *Neptune* holding a trident with the word "*Neptune*" added, which had been registered by the assignor in 1878, under the *Trade-marks Registration Acts*, 1875 and 1876, for the whole of Class 5, described in the *Trade-marks Journal* as "unwrought and partly wrought metals used in manufacture," *E.* duly getting himself registered as proprietor of the trade-mark. The only business actually carried on by *E.* and his assignor was and had been that of a manufacturer of iron sheets. In 1880 *D.* registered a trade-mark bearing the word "*Neptune*" for "steel wire and iron wire" in Class 5, his business consisting solely of the manufacture and sale of wire. In 1884 *E.* brought an action against *D.* for infringement on the ground of the alleged similarity of *D.'s* trade-mark. *D.* then applied by summons under sect. 5 of the Act of 1875 to have the register rectified by limiting *E.'s* trade-mark to the articles in Class 5 other than steel and iron wire :—

Held, in the action, reversing *A. L. Smith*, J., that inasmuch as the goods sold by *E.* and *D.* were entirely distinct, *E.* was not entitled to an injunction :

Held, also, upon the summons (affirming *Bacon*, V.C., with a variation), that, notwithstanding the five years' registration of *E.'s* trade-mark for the whole of Class 5, his trade-mark must be limited to those articles in the class in connection with which it was being actually used, namely, iron sheets.

ON the 17th of October, 1878, *Cromar, Scott, & Co.*, a firm of galvanised iron merchants and manufacturers at *Liverpool*, registered, under the *Trade-marks Registration Act*, 1875, a trade-mark No. 14,288 for the goods in Class 5, described in the *Trade-marks Journal* issued pursuant to the Act and the rules thereunder as "unwrought and partly-wrought metals used in manufacture." The trade-mark was a device consisting of a figure of the god *Neptune* holding a trident, to which was added the word "*Neptune*." The business of *Cromar, Scott, & Co.* was subsequently purchased by "*Cromar, Scott, & Co., Limited*," a company which was formed for that purpose in October, 1881.

That company having subsequently gone into liquidation, the liquidator, on the 13th of September, 1883, sold and assigned for value to *Thomas Edwin Edwards*, the Plaintiff in the action, the goodwill of the company in the trade or business of galvanised iron merchants and manufacturers, including the right of the company to the registered brand or trade-mark "*Neptune*"; and shortly afterwards, pursuant to rule 23 of the Rules under the Act of 1875, *Edwards* was registered as proprietor of the trade-mark in respect of Class 5.

C. A. 1885 EDWARDS v. DENNIS. — *In re* EDWARDS' TRADE-MARK.

The Defendant, *William Frederick Dennis*, was, and had been since the year 1877, the agent in *England* of Messrs. *Felten & Guilleaume*, of *Mulheim*, in *Germany*, manufacturers of steel and iron wire.

On the 20th of March, 1880, *Felten & Guilleaume* registered a trade-mark No. 22,141, for "steel wire and iron wire," in Class 5. This trade-mark consisted of a trident between the letters F. and G. with the word "*Neptune*" underneath. The Defendant *Dennis*, as the agent of Messrs. *Felten & Guilleaume*, sold their wire in the English market under this trade-mark, whereupon, in 1884, *Edwards* brought the above action against *Dennis* on the ground of infringement of his, *Edwards'*, trade-mark. In his statement of claim *Edwards* alleged that he carried on business as an iron merchant and iron manufacturer in *Birkenhead*; that he manufactured and sold galvanised-iron wire and steel under the "*Neptune*" brand; that the business he was carrying on was that which he purchased from the liquidator of *Cromar, Scott, & Co., Limited*; that the goods he manufactured had acquired a great reputation in the market under the name of the "*Neptune* brand"; that *Felten & Guilleaume's* trade-mark was an imitation of his and caused the goods sold by the Defendant to be mistaken for the Plaintiff's.

The Plaintiff accordingly claimed an injunction to restrain the Defendant from using the word "*Neptune*" or the "*Neptune*" brand in connection with the sale of galvanised wire, or other galvanised steel or iron, and from doing any act to induce the belief that wire, steel, or iron sold by the Defendant was of the "*Neptune*" brand; an account of profits; and damages.

In his statement of defence the Defendant alleged that *Felten & Guilleaume's* trade-mark had been used by them for their goods for ten years and upwards prior to its registration; that, as their agent, he had continuously sold, since July, 1877, wire of their manufacture under their registered trade-mark; that both the wire and the trade-mark had been for many years well known in the English market; and that the Plaintiff and his predecessors had been for many years well aware of the user of *Felten & Guilleaume's* trade-mark. He also asserted that the Plaintiff was not the registered owner of the trade-mark No. 14,288, and denied that the Plaintiff or his predecessors ever had any right

thereto. He also insisted that *Felten & Guilleaume's* trade-mark was not an imitation of the Plaintiff's, or calculated to mislead, and alleged that it had been used long before the Plaintiff's.

Issue having been joined, the action was, by the direction of Vice-Chancellor *Bacon*, tried before Mr. Justice *A. L. Smith* and a jury at the *Liverpool* Assizes, 1884. After part of the evidence had been taken, the action was, by consent, withdrawn from the jury and left for the decision of the Judge, who directed the further consideration of the case to come before him in *London*.

In his evidence at the trial the Plaintiff admitted that he did not manufacture wire himself, he having no appliances for the purpose, and that his business consisted almost entirely of the manufacture of sheet iron. It also appeared that the "*Neptune*" brand was exclusively used in connection with sheet iron. On the other hand, it was proved that *Felten & Guilleaume* did a very large trade in the manufacture and sale of wire.

On the 10th of December, 1884, after full argument, judgment was delivered in the action as follows:—

A. L. SMITH, J. (after stating the facts and effects of the evidence, continued):—

The first question that arises is, is this a trade-mark within sect. 10 of the *Trade-marks Registration Act*, 1875? Has it "a distinctive device"? It has a distinctive device of *Neptune* and the trident. Then, are there any words added. The section says, "there may be added to any one or more of the said particulars"—which include "a distinctive device"—"any letters, words, or figures, or combination of letters, words, or figures." I ask myself, is this a trade-mark which could be registered and come within the provisions of sect. 10? It seems to me that it is.

It was argued that "*Neptune*" is nothing more than a fancy word. I cannot hold that at all, because, on the evidence before me, given by the Defendant himself and the other witnesses who were called, "*Neptune*" is the real essence of the trade-mark, whereby the trade-mark is and has been known in the trade, on wire on one side and on iron sheets on the other. I am of opinion, therefore, that this is a trade-mark which could be registered, and properly registered, within sect. 10 of the Act of 1875.

C. A. 1885 EDWARDS v. DENNIS. *In re* EDWARDS' TRADE-MARK. Smith, J.

That being so, what is the position of the Plaintiff? To determine that question we must look at the prior sections of the Act. Sect. 2 says this: "A trade-mark must be registered as belonging to particular goods, or classes of goods." I have already held that this is a trade-mark. It seems to me that it is registered as belonging to a class of goods: that would therefore be so far in fulfilment of the requirements of sect. 2.

Then the section goes on, "and when registered shall be assigned," and so on; "but subject as aforesaid"—that is, as to the trade-mark being assignable only in connection with and being determinable with the goodwill—"registration of a trade-mark shall be deemed to be equivalent to public use of such mark." What is the meaning of the last words of that section? I cannot put any other construction on them than that pointed out by Mr. *French*, that in order to avoid all the controversy which had previously taken place about what was a public use and what was not the Legislature enacted to this effect: "If you register your trade-mark as regards a class of goods so as to satisfy the statute, then it shall be deemed to be a registration of the trade-mark," that is, the fact of the registration shall be deemed to be equivalent to the public use of such mark.

Pausing there for one moment, I ask myself, in the face of this statute, what was the position of the Plaintiff's predecessors in title on the 17th of October, 1878? It seems to me that they had a proper trade-mark registered, and that they must be deemed to have had a "public use" of it prior to its registration.

Now we proceed to sect. 3. Sect. 3 says that if a man has had a trade-mark registered for five years such registration shall be conclusive evidence of his right to the exclusive use of such mark. What is the meaning of that? I have to construe the Act of Parliament, whether it bears harshly on the Defendant or not. It seems to me that if the Plaintiff has a prior trade-mark, if he has duly registered it, and it has been registered for five years, the registration is to be conclusive evidence of his right to the exclusive use of such trade-mark. He has registered a proper trade-mark; he has had it for five years, and he comes to the Court and says: "I have had my trade-mark registered for five years, and I have myself a right to use it; the Defendant has

interfered with my right." Now what is the Defendant doing? The Defendant is putting upon wire the word "*Neptune*," a word which seems to me to be a distinctive and material feature of his trade-mark. The Defendant is, therefore, using and threatening to use on his wares a mark which is of all importance to the Plaintiff. The Plaintiff comes and says: "I ask the Court to stop the Defendant from doing that." It seems to me, upon the facts before me, holding, as I do, that this is a material and distinctive part of the Plaintiff's trade-mark, that the Defendant is infringing the material and distinctive part of the Plaintiff's trade-mark. Therefore, so far, the Plaintiff is right.

The argument which was addressed to me as to there having been no public user by the Plaintiff of wire goods, forcible as it was, is cut away from the Defendant by reason of the words of sect. 2, because that section says that when a man has registered his trade-mark it "shall be deemed to be equivalent to public use of such mark."

Lastly, the question was argued whether two persons can both be upon the register for the same trade-mark. Now I am not going to decide that question one way or the other here. But this does seem to me clear upon the statute, reading it as I do, that the Plaintiff undoubtedly is upon the register, and that he is upon it for the whole class, although I quite agree with what Mr. *Cutler* said, that if a man registers himself for a class he not only registers himself for that class but for all the goods contained in that class; and that does seem to lead to rather a ridiculous conclusion. But the Plaintiff has duly registered himself for a class which he was entitled to register himself for; and what answer is it for the Defendant to say, "I am entitled to be on the class also"? I do not decide whether the Defendant is or is not entitled to be on that class: but it seems to me that when a man has been on the class five years, he has a good ground for saying that another man has no right to come and be put on the register for that class. The Plaintiff says: "I have an indefeasible title to the trade-mark; the statute has given to me the exclusive right to use it, and therefore I ask for an injunction against the Defendant." I am of opinion that the Plaintiff has made out his case, and I therefore give judgment for him for an injunction, with costs.

C. A. 1885

EDWARDS v. DENNIS.

In re EDWARDS' TRADE-MARK.

[His Lordship stayed execution for a fortnight to enable the Defendant to give notice of appeal, which he accordingly did.]

On the 9th of June, 1885, *Felten & Guilleaume* took out a summons under the *Trade-marks Registration Acts*, 1875 to 1877, and the *Patents, Designs, and Trade-marks Act*, 1883, to have the register of trade-marks rectified by limiting the registration of *Edwards'* trade-mark to wrought and partly-wrought metals used in manufacture other than steel wire and iron wire, and not allowing it to remain in respect of all the goods in Class 5.

From the evidence taken on the hearing of the summons it appeared that neither *Cromar, Scott, & Co.*, nor *Edwards*, ever manufactured wire of any description (as *Edwards* himself admitted), though occasionally *Cromar, Scott, & Co.*, galvanised very small parcels for other firms, and sometimes sold very small quantities of galvanised wire, but that no trade-mark was put upon any of such wire unless the brand of other firms was put upon or attached to it in accordance with their instructions; that the quantity of wire sold by *Cromar, Scott, & Co.*, was in fact almost infinitesimal, their principal article of manufacture being galvanised iron sheets, labels bearing the "*Neptune*" brand being placed inside the bundles and cases of sheet iron sent away from the works; and that the company never sold any wire whatever.

It was also proved that in the advertisements and circulars issued by *Cromar, Scott, & Co.* wire was not even mentioned, and *Edwards* admitted having stated, in a trade circular issued by him in May, 1884, that, although his existing business was confined to that of manufacturing and selling galvanised iron sheets, he contemplated extending it to wire-making. The evidence further shewed that *Felten & Guilleaume* had, ever since 1877, continuously used their trade-mark in their advertisements and on all iron and steel wire sent out by them: that their wire was and had been for the last five or six years well known in the English market by the names of "*Neptune* wire" and "*Neptune* brand," and that no other wire except theirs had ever been known under the name of "*Neptune*."

The summons came on for hearing before Vice-Chancellor *Bacon* on the 29th of July, 1885, the Court of Appeal having intimated that they would not proceed with the hearing of the

appeal in the action until his Lordship had disposed of the summons (1).

Aston, Q.C., and *J. Cutler*, for *Felten & Guilleaume*, in support of the summons.

(1.) In the course of the argument the following sections of the *Trade-marks Registration Act*, 1875, were referred to:—

"2. A trade-mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill, but subject as aforesaid registration of a trade-mark shall be deemed to be equivalent to public use of such mark.

"3. The registration of a person as first proprietor of a trade-mark shall be primâ facie evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connexion with the goodwill of a business.

"4. Every proprietor registered in respect to a trade-mark, subsequently to the first registered proprietor shall, as respects his title to that trade-mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor.

"5. If the name of any person who is not for the time being entitled to the exclusive use of a trade-mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade-marks as a proprietor of such trade-mark, or if the registrar refuses to enter on the register as proprietor of a trade-mark the name of any person who is for the time being entitled to the exclusive use of such trade-mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade-mark which is not authorized to be so registered under this Act, any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified; and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved.

"Where each of several persons claims to be registered as proprietor of the same trade-mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the Court, and the registrar may himself submit or require the claimants to submit in the prescribed manner their rights to the Court.

"The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade-mark as is authorized to be registered under this Act, also any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade-marks, or to have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register. . . ."

C. A. 1885 EDWARDS v. DENNIS. — In re EDWARDS' TRADE-MARK.

Hemming, Q.C., and *P. O. Lawrence*, for *Edwards*.

BACON, V.C.:—

This case raises a very important question under the *Trade-marks Registration Act*, 1875, but it embarrasses me to this extent, that the whole of the merits of the case, as they may properly be called, are the subject of litigation elsewhere; and until those merits have been decided I do not think I can fully deal with the case now before me. Nevertheless, as I am told that the Court of Appeal have said they will not proceed with the hearing of the appeal before them until this summons has been disposed of, I must proceed to dispose of it.

The meaning of the Act of Parliament is obvious enough. The whole object is that persons in the enjoyment of what are called "trade-marks" shall, if they register those trade-marks in the manner prescribed so that entire publicity may be given to their alleged rights, have an indefeasible right to them. That is the general scope and object of the statute. But the clauses of the Act point out very plainly what are the limits of the right to be obtained by the registration of a trade-mark. The Act is not very difficult of construction, nor is its meaning far to seek. The 2nd section enacts that "a trade-mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods, or classes of goods, and shall be determinable with such goodwill, but subject as aforesaid registration of a trade-mark shall be deemed to be equivalent to public use of such mark."

In the case before me, it is clear from the evidence, so far as I am at liberty now to refer to it, that *Cromar Scott, & Co.* never did manufacture steel and iron wire, or galvanised steel and iron wire; though when they approached the Registrar to register their trade-mark they registered it for an entire class of goods. The class of goods is Class 5 in the list in the 1st Schedule to the rules under the Act, and it contains thirteen descriptions of manufacture coming under the general description of "unwrought and partly wrought metals used in manufacture." "Iron wire" is contained in Class 5, but I think the general effect of the

evidence is (and, indeed, it is not disputed) that *Cromar, Scott, & Co.* never did manufacture any iron wire. If, then, they never did manufacture iron wire, would it be a reasonable construction of the statute to say that, because a man manufactures only one out of a class of goods, he should be able, by registering a trade-mark applicable to all the class, to exclude the manufacture of any of the other twelve articles of manufacture, and prevent another person who has adopted a trade-mark in connection with any of those other articles from designating his particular goods by that mark? That would be a most unreasonable construction of the Act of Parliament.

I believe the Act of Parliament meant that the person who desired to secure the possession of the trade-mark should specify in his registration what particulars out of the class, if he does not claim the whole of them, he desires his trade-mark to be applied to. If I were to listen to the argument addressed to me on behalf of Mr. *Edwards*, a man who deals in gold, and stamps gold watch cases, would be restricted from using this trade-mark because a man who makes sheet iron has already registered the trade-mark. I will not go through the thirteen articles mentioned or referred to in class 5, but I think the fair way of looking at the case is to say that *Cromar, Scott, & Co.* claimed the use of the "*Neptune*" trade-mark only for the goods which they were in the habit of manufacturing in the trade or business of which they had the goodwill. The goodwill they transmitted to Mr. *Edwards*, and Mr. *Edwards* can claim nothing but what *Cromar, Scott, & Co.* did claim and did mean to claim on this registration. That disposes of the one point.

The other point is as to the period of time. The notion that this Act of Parliament does not authorize the Court to go beyond the five years, or that, when a trade-mark has been registered for five years, neither the Court, nor the Registrar, nor any other human being, can disturb it, is one I cannot entertain. *In re Palmer's Application* (1) is a direct decision on that subject, although, as regards the facts of the case, they differed altogether from the present. I find in the course of the observations of the Judges in that case the tendency of their opinion very clearly

(1) 21 Ch. D. 47.

C. A. 1885 EDWARDS v. DENNIS. *In re* EDWARDS' TRADE-MARK. V.-C. B.

indicated. The Master of the Rolls in his judgment says (1): "The contention on the part of the respondents, which succeeded before Mr. Justice *Chitty*, was that the 3rd section contained a limitation as to time. Now, of course, if one section of an Act of Parliament gives a remedy, and another section says that the application must be made within a certain number of years, the two sections must be read together, and the application cannot be made after the expiration of that time; but where the power is given generally without limit, the subsequent section cannot confine the application to a particular period, unless clear expressions to that effect are used. It is clear that the 3rd section does not expressly say that the application under the 5th section shall not be made after five years, but the respondents contend that the words which I am about to read impliedly have that effect." I am reading these passages because they go to the very point of Mr. *Hemming's* argument, to which I have paid all the attention that he can desire.

The Master of the Rolls proceeds to read the 3rd section of the Act, and then he says: "Now what is the meaning of the words 'the registration of a person as first proprietor of a trade-mark'? Does it mean his registration as proprietor of 'a mark,' or does it mean what it says, his registration as proprietor of 'a trade-mark'? I think the literal reading is to be preferred. It is true that the Registrar ought not to enter anything which is not capable of being a trade-mark, but he may be deceived, and that is alleged to be the case here. The Registrar of Trade-marks cannot know nor can the Commissioners know the meaning of all technical terms used in a trade." Then, after dealing with the name "braided fixed stars," and with the contention of the respondents, his Lordship takes the case of a man selling palm oil soap under the name of "palm oil soap," and he says: "suddenly somebody comes down against him and says, 'I registered those words five years ago as a trade-mark. I therefore change by the force of the Act of Parliament those words which are ordinary words of description into a trade-mark, and now I am entitled to restrain you from using them.' If this were to be allowed, it would be allowing a man who had taken an improper advantage

(1) 21 Ch. D. 57.

of the ignorance of the Registrar, and of the Commissioners if it came before them, as to the use of the technical terms of the trade, to lay a trap for an honest tradesman who had done nothing but sell his goods under their proper description."

In the course of the argument, Lord Justice *Cotton*, in answer to an observation made to him, refers particularly to the third paragraph of the 5th section, which has also been discussed to-day. That third paragraph is: "The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade-mark as is authorized to be registered under this Act, also any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade-marks, or to have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register." If the register stands in its present shape it precludes *Felten & Guilleaume* from using their trade-mark, which is said to be similar to *Edwards'* trade-mark. I do not go into the question of the similarity between the two trade-marks, because that is not a question for me to consider, and the Court of Appeal must consider that on what I call the merits of the case. But the right of the Court to rectify a trade-mark, although it has been five years or any number of years on the register, I cannot doubt.

Now, upon the facts, as far as they are not disputed before me, it appears that *Cromar, Scott, & Co.* registered a trade-mark. They refer to the description in the schedule of the class, which consists of thirteen items. They had at that time no right to register the trade-mark for anything they had not then made or were not then about to make. The firm was then turned into a company, which became insolvent, and their trade-mark was transmitted to and taken by *Edwards*, and *Edwards* acts exactly on the same principle as they acted. He publishes an advertisement, and he says in his affidavit that he did, in May, 1884, state in his trade circular that he was not making iron wire: he was not then doing so, nor was he doing so at any time until he desired to come into a sort of rivalry with *Felten & Guilleaume;* and thence came this litigation.

C. A. 1885. EDWARDS v. DENNIS. *In re* EDWARDS' TRADE-MARK. V.-C. B.

I am of opinion, upon this mere legal point, the construction of the Act of Parliament with reference to the facts, which have not been disputed, that I ought to order the register of trade-marks to be rectified by limiting the registration of the trade-mark No. 14,288 to unwrought and partly-wrought metals used in manufacture other than steel wire and iron wire, and by not allowing the trade-mark to remain in respect of all the goods in Class 5. That is the order I now make, assisting, as far as my humble endeavours extend, the Court of Appeal in disposing of the whole of the case before them, and the merits, if there are any.

The costs of the application I reserve until after the Court of Appeal shall have dealt with it.

C. A.

From this decision *Edwards* appealed. The appeal was heard on the 30th of July, and 1st and 11th of August, 1885.

The Defendant's appeal in the action, and *Edwards'* appeal on the summons, were set down together for hearing.

At the suggestion of the Court the arguments on behalf of *Edwards* were heard first.

Hemming, Q.C., *French*, Q.C., *Solomon*, and *P. O. Lawrence*, for *Edwards*:—

We submit that the learned Judge was right in granting us the injunction in the action, for we had acquired an indefeasible right to the exclusive user of the "*Neptune*" brand against all the world. With regard to the summons, it raises, for the first time, the question whether a man is entitled to register, and can maintain his right to, a trade-mark in respect of an entire class of goods, when his actual trade or business in which the trade-mark is used is limited to one or more articles in that class. Our registration was general for the whole class, Class 5, under the *Trade-marks Registration Act*, 1875. A person, on applying for and obtaining registration of a trade-mark, is limited to a particular class, but not to specific articles in that class. In the earlier cases it was treated as an indulgence to allow registration for part of a class: *In re Hargreaves' Trade-mark* (1): and never,

(1) 11 Ch. D. 669.

until the present decision of the Vice-Chancellor, has a man been prohibited from registering for a whole class. We claim an exclusive right to our trade-mark for every object in Class 5. If it is said that this is a hardship to others, the answer is that anyone trading in articles falling within the class can come and oppose the registration. The Court has no power to interfere with a trade-mark once registered, except under Rule 34 on discontinuance of the business in respect of which the trade-mark was registered; but the present summons is not under that rule. The only enactment under which *Felten & Guilleaume* can claim the jurisdiction of the Court is sect. 5 of the Act of 1875; but under sect. 3 the Court cannot touch a trade-mark which has, as in our case, been on the register for five years.

[LINDLEY, L.J.:—One of the points against you is, that you have not such a goodwill in the iron business as will carry the trade-mark for the wire.]

We submit that it is sufficient that there should be a goodwill in respect of part—not necessarily all—of the goods in the particular class: sect. 2 of Act of 1875, and Rule 24. If the assignment was defective, no doubt the assignor must suffer; but if the assignment was right the assignee takes all that the assignor had. Supposing there is a defect in the title of the original applicant for registration, the assignor, if his trade-mark has been on the register for five years, the defect in the original registration is cured by lapse of time. Thus, any defect there may have been in *Cromar, Scott & Co.'s* title has been cured, and whether the original application was right or wrong is immaterial. In *In re Palmer's Trade-mark* (1) the thing registered was not a "trade-mark" at all, but no one disputes that our trade-mark is a good mark. If registration for a general class is not permitted, it will entail great difficulty and trouble on the proprietor of a trade-mark, for it will necessitate his making a fresh registration on his extending his business to each new article in that class. Although *Edwards* is not at present making wire, he intends to do so when he has developed his works, and the manufacture of it comes properly within the scope of his business. Registration

(1) 24 Ch. D. 504.

C. A. 1885 EDWARDS v. DENNIS. — *In re* EDWARDS' TRADE-MARK.

wide enough to cover an entire class is not contrary to public policy, for it does not confer an exclusive right to make the articles, but only to use the particular trade-mark in connection with them. The Act no doubt contemplates the existence of a business within a certain time, but it does not say that the business is to be contemporaneous with the registration. Provided we can see a probability of our hereafter requiring to use our trade-mark on goods we are not now making but shall make, we have a right to registration of the trade-mark so as to cover those goods: otherwise we shall be hampered in our trade, for someone else may use the mark and thus prevent our using our own trade-mark. The Act of 1875, like all Acts conferring a title to property by registration, should be construed strictly, and therefore sect. 3 should be read literally as conferring an exclusive title after five years' registration, the register being open to all the world until the full title is acquired. The "goodwill" assigned to us was that of an iron manufacturer, and would therefore cover the making of wire; so that any objection that might be raised under sect. 2, on the ground that *Cromar, Scott, & Co.* were not making wire is removed.

Aston, Q.C., *Henn Collins*, Q.C., and *J. Cutler*, for *Dennis;* and *Aston*, Q.C., and *J. Cutler*, for *Felten & Guilleaume*:—

With regard to the action, inasmuch as neither *Dennis* nor his principals, *Felten & Guilleaume*, have taken the whole of *Edwards'* trade-mark, *Edwards* is thrown back on his common law rights, and he has not succeeded in proving any attempt on our part to pass off our goods as his. We have sold wire only, and the evidence is conclusive that neither *Edwards* nor his predecessors ever made wire. Moreover, "*Neptune*" is a mere fancy word, and not within the definition of a "trade-mark" in sect. 10 of the Act of 1875.

Upon the question as to the effect of the Act of 1875 and the rules thereunder, we admit that the Act says nothing about user in connection with the registration of a new mark; but, directly it is attempted to pass a trade-mark as an item of property, then, by sect. 2, it must have been used "in connection with the goodwill of the business concerned," and here the business never was

or has been concerned with the manufacture of wire. The title conferred by sect. 3 after five years' registration is subject to the provisions of the previous section as to the connection of the trade-mark with the goodwill of the "business." Two trade-marks may be registered for different goods in the same class, provided they do not clash: *In re Braby & Co.'s Application* (1); *In re Jelley, Son, & Jones' Application* (2). The expression "exclusive use" in sect. 3 means exclusive use only as against all persons who themselves are not on the register, and not as against those who are. We are rightly on the register, and therefore no action or proceeding can lie against us. Again, "conclusive evidence" applies only to goods of which the registered proprietor for the time being has the goodwill, the extent of his business being the measure of his rights. We submit it is not competent for a person who is on the register for a large overlapping class—a class including goods other than those in which he actually deals—to stop another from getting registered for part of that class. [They also referred to *Sebastian* on Trade-Marks (3).]

Hemming, in reply:—

In *In re Braby & Co.'s Application* was not a case of registration for a whole class; and in *In re Jelley, Son, & Jones' Application* the order, so far as it concerned Class 5, seems to have been a consent order.

If sect. 3 is to be restricted in the manner suggested, the result will be that the thing to which the Act says in terms a man shall have the exclusive right is destroyed. It cannot be the intention of the Act that because the proprietor of the trade-mark does not at the time of registration trade in all the goods in the class for which he is registered, his title to the trade-mark is destroyed in respect of all goods not comprised in the business in which he is immediately engaged. I submit that, as the man extends his business to other goods in the class, so his trade-mark should be held to extend to those goods also.

[LINDLEY, L.J.:—Supposing I register a trade-mark, though not carrying on business at all: what are my rights under sect. 3?]

(1) 21 Ch. D. 223. (2) 51 L. J. (Ch.) 639, n. (3) 2nd Ed. p. 116.

C. A. 1885 EDWARDS v. DENNIS. In re EDWARDS' TRADE-MARK.

That question has not yet arisen. The Legislature must have had in their minds, when they passed the Act, a man already trading to a certain extent, with the possibility of his extending his trade.

When a man has once acquired the exclusive right under sect. 3, the jurisdiction under sect. 5 to rectify the register is gone so far as he is concerned, because cases where an exclusive right has been acquired are expressly excepted from the jurisdiction. Sect. 2 is not confined to the business actually carried on at the moment of registration: it means that the goodwill and the business shall not be severed by different assignments: that they must be assigned together: that there shall be a substantial goodwill; and that the trade-mark may extend beyond the particular business, though not beyond the limits of the class. I submit that sect. 4 puts the assignee in exactly the same position as the assignor, and that in the present case it is impossible to interfere with the registration, having regard to the expiration of the five years. Any other construction would simply deprive sect. 3 of any operation at all.

1885. Aug. 11. COTTON, L.J. (after stating the facts, said):—

I will first of all deal with the action. The Plaintiff, Mr. *Edwards*, is not a manufacturer of iron wire, but of galvanised iron plates, and the business which he purchased was not that of a manufacturer of iron wire. The question, then, is whether he is entitled to any relief. Now, although he does not carry on the business of making and selling galvanised wire, he rests his case almost entirely upon the *Trade-marks Registration Act*, 1875. In the first place, what is the object of that Act? Speaking generally, its object is, not to give new rights, but to place restrictions on the bringing of actions for infringement of trade-marks by requiring that a trade-mark shall be registered before any action to prevent its infringement can be brought. That is provided for by the 1st section of the Act as amended by the subsequent Act of 1876. Another object of the Act is to facilitate evidence of title to trade-marks by means of registration; for the 3rd section of the Act provides that registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his

right to the exclusive use of the trade-mark, and that five years' registration shall be conclusive evidence of his right to such exclusive use. Then sect. 4 provides that a subsequently registered proprietor shall, as regards his title to the trade-mark, stand in the same position as if his title was a continuation of that of the first proprietor. It is unnecessary to consider what would have been the result if the Defendant, or his principals, Messrs. *Felten & Guilleaume*, had taken the Plaintiff's trade-mark that was on the register and used it in connection with their wire. No doubt the intention of the Act is to give a right to what is on the register so as to enable a person who has been registered for five years as the proprietor of a trade-mark to maintain an action against any other person taking or infringing that trade-mark: but when the alleged infringement consists of using, not the exact thing upon the register, but something similar to it, the Court must, in considering whether there has been an infringement or not, proceed upon the old principle, which prevailed both at law and equity before the Act, that a man is not to pass off his goods as the goods of another. At common law the man thus injured might obtain damages, and in equity the more effectual protection of an injunction.

In the present case it is said that the Defendant is passing off his goods as the goods of the Plaintiff. Now it appears that the real Defendants, Messrs. *Felten & Guilleaume*, have been carrying on business for many years, and are and have been confining themselves to the manufacture and sale of wire. On the other hand, the Plaintiff is and has been selling only sheet iron. Can it be said that by placing this label or mark of which the Plaintiff complains on their bundles of wire the Defendants are passing off their goods as those of the Plaintiff, when the Plaintiff is not selling that class of goods at all? If they had been using it as a trade-mark upon the same description of goods as those manufactured by the Plaintiff that might have led people to believe that those goods were the Plaintiff's manufacture; but when we find that the goods are so distinct as they are in this case, I should say, as a judge of fact, that the Defendants are not doing anything to mislead people into thinking that their goods are the goods of the Plaintiff. In my opinion, therefore, Mr. Justice

C. A. 1885

EDWARDS v. DENNIS.

In re EDWARDS' TRADE-MARK.

Cotton, L.J.

Smith was wrong, and this is not a case for an injunction. Accordingly, the appeal in the action must be allowed.

Then comes a matter which requires more careful consideration, for the question is as to the construction of the Act of 1875. The German firm, who are the Defendant's principals, took out a summons to rectify the register by limiting the registration of *Edwards'* trade-mark, the application being made under the 5th section of the Act, which is in the following terms:—[His Lordship read the section, and continued:—] Now the first objection on behalf of Mr. *Edwards* is this. The trade-mark of which Mr. *Edwards* claims the exclusive user has been on the register since 1878; that is to say, it has been on the register for more than five years. Accordingly, Mr. *Edwards* says that his trade-mark cannot now be impeached, and he relies on the 3rd and 4th sections of the Act. The 3rd section contains this provision: "The registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade-mark." Then the 4th section continues the title of the first proprietor in the hands of a subsequent proprietor. I am not now considering how far the fact of Mr. *Edwards* and his predecessor having been on the register for five years is an answer to this application, though, in my opinion, it is not. It appears to me that the 3rd section is intended to afford assistance to a person who is bringing an action against another person of passing off his goods as the goods of the person who brings the action. In such a case, if the Plaintiff shews that he has been on the register for five years, that dispenses with the necessity of his adducing evidence of exclusive user of his trade-mark. But the 3rd section is no bar to an application under the 5th section for rectification of the register, and in the case of such an application the Court is bound to consider—as the Court of Appeal held in *In re Palmer's Application* (1)—whether the trade-mark is properly on the register: for, although it may have been on for five years, if it ought not to have been on at all, then it can be taken off.

(1) 21 Ch. D. 47.

So that, on the question whether a trade-mark is properly on the register, the 3rd section is no bar to an application to rectify the register.

The question, then, here is whether, as regards this trade-mark, Mr. *Edwards* is entitled as proprietor by assignment to be upon the register—a different question to that which we should have had to consider if the original proprietor had been brought before us. The question is how far, having regard to the Act, a mark not being actually used in connection with goods can be registered as a trade-mark. A trade-mark is a mark used in trade to distinguish the goods of the person who uses it; and the Act appears to contemplate a user of the particular mark contemporaneously with, if not before, registration. The 1st section places a restriction on actions being brought for infringement of trade-marks, for it says that "From and after the 1st day of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade-mark as defined by this Act until and unless such trade-mark is registered in pursuance of this Act." The person with whom the Act is dealing is a person who would have been entitled under the old law to bring an action for the infringement of his trade-mark, that is to say, a trade-mark actually used by him. The 1st section therefore assumes that it is dealing with a person who is using his trade-mark.

The 2nd section, which deals with the assignment of a trade-mark, says that "a trade-mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods." There it assumes there is a trader using the particular mark. There are other sections of the Act also assuming user; for instance, sects. 3 and 5 refer to the five years' "exclusive use" by a person of his trade-mark: they assume he is using it. There are many parts of the Act as to which it will have to be decided how far there can be registration of a trade-mark which is never used in trade. Sect. 10, which, in defining a trade-mark, says that for the purposes of the Act a trade-mark "consists of" certain essential particulars, does not mean to include a trade-mark which is never used.

C. A. 1885 EDWARDS v. DENNIS. *In re* EDWARDS' TRADE-MARK. Cotton, L.J.

Now what was done in the present case? There was a registration by Mr. *Edwards*' predecessors in title for Class 5, "unwrought and partly-wrought metals used in manufacture." That was registration in respect of all goods which come under Class 5, a class which includes a vast number of things. It is not exhaustive in its terms: it only gives examples of the articles included in it, for it says "such as" iron and steel, iron rough, iron rails, iron sheets, and so forth. The registration in the present case has been for the entirety of that class. In my opinion that is wrong. Even if a trade-mark can be registered which is not in actual use it ought to be restricted to those goods in connection with which it is going to be used. In my opinion it is not the intention of the Act that a man registering a trade-mark for the entire class and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in the class. In the present case it is an assignment of a registered trade-mark under which Mr. *Edwards* claims; and sect. 2 of the Act says that a trade-mark when registered shall be assigned only in connection with the goodwill of "the business concerned in" the particular goods or classes of goods to which the trade-mark has been registered as belonging. Can a man claim registration for all the articles specified in the class when the business he is engaged in comprises only one specific portion of the articles named in the class? I am of opinion he cannot. When a man is on the register by assignment the trade-mark can only be assigned in connection with the goodwill of the business, and therefore one has to consider what the goodwill of the business here was. Now, from the evidence it appears that Messrs. *Cromar, Scott, & Co.* did perhaps sell a small portion of wire, but that the company did not; and it also appears that Mr. *Edwards*, who is now carrying on the business the company carried on, does not either manufacture or sell iron wire. The assignment to him was of the goodwill of the business of manufacturing galvanised iron sheets. On the register he is entered as being entitled by assignment to the trade-mark belonging to all goods coming under the head of "unwrought and partly-wrought metals used in manufacture," but the business he is actually concerned in is that of the manufacture of galvanised iron sheets only: consequently I am of opinion that the

register ought to be rectified, though not exactly in the way the Vice-Chancellor has directed, because that would lead to successive applications being made by various persons to further cut down the registration. The Vice-Chancellor allowed the registration to stand for all the goods in Class 5 except iron wire; but I think the proper course is to let it stand for unwrought and partly-wrought metals consisting of galvanised iron sheeting. This would shew what are the goods in respect of which he claims to use his trade-mark.

In the course of the argument it was asked, what is to be done if a man extends his business? We have not to deal with that question now, but still we ought to notice it. In my opinion, if a man wishes to extend his business to a new description of goods and to use his trade-mark in connection with the goods, he ought to register it in respect of those goods. All we have now to do is to construe this Act of Parliament; and it appears to me that it would be a wrong interpretation of the Act to hold that, when registration is general for an entire class, it can be maintained for that class by a man who is assignee of a business in only one particular description of goods in that class.

I have only one other observation to make. The necessity of registering in the way I have mentioned is apparent, when we consider that, when there has been registration for five years, the Act does give the man who has had a trade-mark on the register for that period the exclusive right to use it. That assumes there must have been during that time an actual user of the trade-mark; for the Act cannot surely mean that the man can claim exclusive user of his trade-mark when in fact he has never used it at all. Although we have not to decide that question now, still it does, in my opinion, shew the necessity that power should be vested in the Court of dealing with a trade-mark that is on the register.

The Vice-Chancellor's order on the summons must be varied in the way I have mentioned, and Mr. *Edwards* must pay the costs of this appeal.

LINDLEY, L.J.:—

This case gives rise to questions of considerable importance upon the construction of the *Trade-marks Registration Act*, 1875.

C. A. 1885 EDWARDS v. DENNIS. *In re* EDWARDS' TRADE-MARK. Lindley, L.J.

The point which it is necessary for us to decide is, what was the right which Mr. *Edwards* acquired on the 13th of September, 1883? At that time he was, and his predecessors in title had been, carrying on business as sheet iron manufacturers. Looking at the evidence, I think I am right in saying that at that time there was nothing to which this trade-mark applied except the business which *Edwards* was then carrying on, and which he had derived from his predecessors; and that when his predecessors registered this trade-mark they were carrying on business as galvanised sheet iron manufacturers and were using this trade-mark in connection with this business, and no other. Under the Act of 1875 they registered the trade-mark in respect of Class 5 headed—"Unwrought and partly-wrought metals used in manufacture"; and when we turn to Class 5 we find it gives examples of the articles falling under that head. Mr. *Edwards*' predecessors having thus registered in this general form, he, upon purchasing and taking an assignment of the goodwill of their business and their trade-mark, was duly registered as the proprietor of the trade-mark. The first question is, What right did Mr. *Edwards* acquire by his assignment and subsequent registration? It is said that under the Act of 1875 he acquired the exclusive right to use the trade-mark in connection with all the goods named in Class 5; and the argument is put as high as this—that the Act gives him either the right to damages or the right to an injunction against any rival manufacturer who chooses to use this trade-mark in connection with goods which Mr. *Edwards* himself does not manufacture. Pushed to an extreme the argument means this—that a man having no business at all by simply registering a trade-mark acquires the exclusive right to use it. That construction of the Act seems so irrational that I cannot adopt it. A trade-mark has no sense except in connection with trade. When therefore Mr. *Edwards* got himself registered as proprietor of this trade-mark, it is perfectly preposterous to say that he thereby acquired any right to bring an action against a person, say a goldsmith, who may manufacture goods of a kind entirely distinct from that which he himself manufactures. The argument is based upon the expression in the 2nd section of the Act that "a trade-mark must be registered as belonging to

particular goods, or classes of goods." No doubt the Act is so expressed; but does it mean that there is to be registration irrespective of the fact as to whether the person registering manufactures any goods or not? In my opinion it is perfectly ridiculous to suppose it means that a trade-mark is to be registered as belonging to goods which the man does not manufacture at all. It must mean that the mark is to be registered, not in connection with nothing, but in connection with the particular trade in respect of which he desires to use it.

Another observation to be made is this. A construction has been attempted to be put upon the Act to the effect that the assignee of a trade-mark registered in respect of an entire class is entitled to the exclusive use of it in connection with any article included in that class, whether the assignee's business extends to that article or not. But the assignee must be in the same position as the assignor: he cannot be in any better position; therefore it is perfectly plain that it is his own right under the Act which the assignor assigns. Having regard to the object and meaning of the Act, the registration of trade-marks is senseless except in connection with the trade of the person registering. Now looking at Mr. *Edwards'* action, which is based on registration and seeks an injunction and damages, it appears to me that he is not entitled either to an injunction or to even nominal damages; and accordingly, so far as that action goes, the appeal must be allowed and judgment must be entered for the Defendant.

Next with regard to the rectification of the register. The question we have to consider is this: Is there any ground for rectifying the register? In my opinion the existing registration has no application to a class of goods in which Mr. *Edwards* carries on no business whatever. Surely an iron manufacturer could not obtain a restriction of registration against, for instance, a gold manufacturer.

Then with regard to the five years' registration. When we come to look at sects. 3 and 5 it is clear that they do not depend upon one another, sect. 5 not being consequent on sect. 3. The meaning of the sections is this: when a man brings an action for infringement, if he has been on the register for five years, sect. 3 is conclusive as to his right to bring the action, and in that

C. A. 1885
EDWARDS v. DENNIS.
In re EDWARDS' TRADE-MARK.
Lindley, L.J.

particular action such registration is conclusive evidence of his right to the exclusive user of his trade-mark; but, having regard to sect. 5, it appears to me that the register can be rectified in respect of that trade-mark, notwithstanding the five years' registration, if proper proceedings are taken for that purpose. The Act cannot mean that a man whose trade-mark ought to have been restricted to a particular trade acquires the exclusive use of it in all trades because he happens to have been on the register for five years. In my opinion the true construction of the Act is that the register can be rectified, even after the five years, in a proper case. Now the Vice-Chancellor was also of opinion that the register could and ought to be rectified, and he accordingly ordered it to be rectified by limiting the registration to articles in Class 5 other than steel and iron wire. I think that in substance he was right but that the form of the order is not quite right. The registration should be confined to the business which Mr. *Edwards* bought, namely, the manufacture of galvanised iron sheets.

FRY, L.J.:—

I propose to confine myself to only a few observations.

In the first place, as regards the action, it appears to me that, assuming the Plaintiff's title under the Act, he is bound to shew, either that the Defendant has taken the whole or a substantial part of his trade-mark, or that the Defendant has used his, the Plaintiff's, trade-mark in such a manner as to lead the public to believe that his, the Defendant's, goods are the Plaintiff's. In my opinion the Plaintiff has failed to do either. He does not shew that his trade-mark has been taken by the Defendant, or that the Defendant has sold any goods in such a manner as to lead a person to believe they are the goods of the Plaintiff. When one sees that the Plaintiff deals only in iron sheets, and the Defendant exclusively in iron wire, it is impossible that the public could be led into any mistake. I am of opinion, therefore, that the action must be dismissed with costs.

Then, upon the summons, two questions arise. The first is whether the summons can be heard under the 5th section of the Act, having regard to the 3rd section, which gives a person who

has been on the register for five years the right to the exclusive use of his trade-mark. It appears to me that the 5th section is independent of the 3rd, and that the title acquired under the 3rd section is no bar to an application being made under the 5th section to rectify the register. Although, under the 3rd section, five years' registration is made conclusive evidence of title, under the 5th section the registration can be amended when circumstances require it. Assuming, then, that the Court has jurisdiction, the question is, Ought the register in this case to be amended? Now, I share the doubt expressed by Lord Justice *Cotton*—namely, whether a man can claim the exclusive use of a trade-mark unless it is a trade-mark actually used as such at the time of registration. I entertain that doubt because the 1st and 2nd sections of the Act appear to me to imply the pre-existence, before registration, of the trade-mark and also of the business concerned in the goods in respect of which the trade-mark is used. However, that is not the question now before us, and therefore I will not go beyond expressing a doubt upon the point: but I do express my opinion that, under the 2nd section, no trade-mark can be assigned except in connection with the goodwill of the business in which it has been used, which business must be co-extensive with the goods or classes of goods in respect of which the trade-mark is registered. The result, therefore, is that, if a person registers a trade-mark in respect of goods in which he carries on no business, he does so at his peril, and an assignee has no exclusive right to a trade-mark unless the assignment is of a business co-extensive with the trade-mark as registered.

Now, in the present case, Mr. *Edwards* claims that under his assignment he became entitled to the exclusive use of the trade-mark in respect of the entire class of goods falling under the head of "unwrought and partly wrought metals used in manufacture," whereas the goodwill assigned was only that of the business of manufacturing galvanised iron sheets. Consequently, the assignment did not extend to the entire class, and Mr. *Edwards*' contention cannot, therefore, be sustained.

Upon the summons, therefore, there must be an order to rectify the register by restricting Mr. *Edwards*' trade-mark to galvanised

C. A. 1885 EDWARDS v. DENNIS.

iron sheets, and the Vice-Chancellor's order must be varied to that extent.

The costs of the appeal from that order must be paid by Mr. *Edwards*.

In re EDWARDS' TRADE-MARK.

Solicitors: *Byrne & Lucas*, agents for *Whitley, Maddock, & Co., Liverpool; Van Sandau, Cumming, & Co.*

G. I. F. C.

C. A. 1885 Aug. 12.

In re MANNING.

Bankruptcy—Receiving Order—Attachment—Arrest of Debtor between Date and signing of Order—Bankruptcy Act, 1883, *s.* 9—*Bankruptcy Rules*, 1883, *r.* 153; *Appendix, Forms* 29 *and* 30.

Having regard to the terms of sect. 9 of the *Bankruptcy Act*, 1883, as to the effect of a receiving order in protecting a debtor from arrest, the order must be deemed to have been "made" on the day it was pronounced, and therefore as protecting the debtor as from that day.

Therefore, where a debtor had been arrested under an order of the Chancery Division made after the date of a receiving order pronounced before, but not drawn up and signed by the Registrar (Bankruptcy Rules, 1883, r. 153, Appendix, Forms 29 and 30) until after the arrest, he was ordered to be discharged, notwithstanding that he had by his counsel submitted to the order of attachment.

Order of *Kay*, J., affirmed.

MR. *WILLIAM THOMAS MANNING*, solicitor, had acted as parliamentary agent for the *Driffield Water Company* in obtaining the passing of the *Driffield Water Act*, 1882, and in that capacity had received various sums of money, amounting to £2950, on account of costs. On the 4th of July, 1884, an order was made by consent for the delivery to the company by Mr. *Manning* of his bill for taxation, and for the payment by either party of what should be certified to be due to the other on such taxation. In pursuance of that order Mr. *Manning* delivered his bill, which was eventually taxed, the Taxing Master's certificate shewing a balance of £1138 16*s.* 7*d.* to be due from him to the company.

Mr. *Manning* having failed to pay this balance in compliance with the said order, on the 18th of June, 1885, an order was made upon motion on behalf of the company, whereby, after

reciting that Mr. *Manning* had made default in payment as directed by the order of the 4th of July, "and that such default was a default made by him as a solicitor in his character of an officer of the Court, making the order within the meaning of the *Debtors Act*, 1869, and the said *W. T. Manning* by his counsel submitting to the present order" and admitting the amount due under the previous order, it was ordered that the company should be at liberty to issue an attachment against Mr. *Manning* for his contempt in not having paid the amount. On this order being obtained it was arranged that it should not be drawn up if £250 was paid within a week and security given for the balance. Mr. *Manning*, however, failed to comply with these terms, and the order was, after the expiration of a week, drawn up, a writ of attachment was issued, and on the 23rd of July, 1885, Mr. *Manning* was arrested. Previous to the order of 18th of June a receiving order in bankruptcy had been made against Mr. *Manning* by Mr. Registrar *Hazlitt*, such order being "dated 2nd May, 1885," though it was not expressed to be "signed" by the Registrar until the "24th July," the day after Mr. *Manning's* arrest. On the 27th of July Mr. Justice *Kay* made an order for Mr. *Manning's* discharge, on the ground that a receiving order had been "made" against him prior to his arrest, the learned Judge considering that, having regard to the terms of sect. 9 (1) of the *Bankruptcy Act*, 1883, he had no alternative but to order the prisoner's release.

The company now moved to discharge this order of the 27th of July.

F. C. Willis, for the company:—

In the first place, the order for attachment was made with *Manning's* consent, although he knew that the receiving order

(1) Sect. 9 is, so far as is material, as follows:—

"On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

C. A. 1885 *In re* MANNING.

had been made. He cannot, therefore, now say that the order for attachment was nugatory. He should have raised the point when the order was asked for. Secondly, assuming that a debtor, on a receiving order being made, is entitled under sect. 9 of the *Bankruptcy Act*, 1883, to protection from arrest, that protection does not arise until the receiving order has been perfected by being signed and gazetted: sect. 13; Bankruptcy Rules, 1883, r. 153; Appendix, Forms 28, 29, 30, 127.

[LINDLEY, L.J.:—The Act does not say the order shall be signed.]

Forms 29 and 30 prescribed by rule 153 as the proper forms of a receiving order say so.

[COTTON, L.J.:—Does not a receiving order when "made," that is, "pronounced," have the same effect as an order "made" in either the Queen's Bench or the Chancery Division?]

A receiving order of the Bankruptcy Court is different from an order of any other Court. Something more has to be done than the making of the order by the Registrar before it can be carried into effect. Various sections of the Act, such as sects. 20, 24, 26, and 70, shew the proceedings consequent on a receiving order. If the debtor desires the protection of a receiving order he must use due diligence to have it drawn up.

[COTTON, L.J.:—I do not see how we can get over the words of the 9th section. If we had any discretion in the matter, it might be another thing.]

The receiving order cannot affect the debtor until it is signed by the Registrar according to the Forms and notice of it is given to the official receiver and the Board of Trade: rule 153. "Thereafter" in sect. 9 means after the official receiver has been constituted. He is not invested with full powers, and cannot take possession of the debtor's property until he gets his order, just as a sheriff's officer cannot take possession until he has his warrant: the receiving order is, in fact, the official receiver's warrant.

H. B. Buckley, for Mr. *Manning*:—

[COTTON, L.J.:—We will not trouble you upon the construction

of sect. 9; but what do you say as to the order for attachment having been made with Mr. *Manning's* consent?]

It was not a "consent order" at all. The case was simply this: Mr. *Manning* did not desire to have the matter gone into and discussed in open Court, and therefore by his counsel "submitted" to the order being made. As to the argument that it is too late to raise the question as to the efficacy of the order for attachment, it was not necessary for the debtor to raise it until the party who obtained the order came to enforce it.

Willis, in reply.

COTTON, L.J.:—

There are two points here, and I will take the more important one first. It is said that Mr. *Manning* is not entitled to the protection given him by sect. 9 of the *Bankruptcy Act*, 1883, because at the time he was attached the receiving order had not been signed. The order had been pronounced by the Registrar on the 2nd of May, but, for some reason, it was not signed by him until the 24th of July, after Mr. *Manning* had been arrested, and therefore it is said he was not entitled to be protected. That simply depends upon the construction to be put on sect. 9. Now, that section gives the Court no discretion in the matter, and we must simply give effect to the Act of Parliament as expressed. If the Act is so drawn that it does not say that certain things are to be done which ought to be done, then the Legislature must amend their Act, and not throw it upon the Judges to place a construction upon it which the words will not bear. The terms of sect. 9 are plain. [His Lordship read the section, and continued:—] This section puts no discretion at all in the hands of the Court, save where the debtor is entitled to protection; so that all we have to do is to say what the word "thereafter" means. In my opinion it means "after the making of the receiving order." Although, in one sense, the document, which in the present case is the evidence of the order pronounced, was not perfected until the 24th of July, yet the receiving order pronounced by the Registrar was as a matter of fact made on the 2nd of May. The "order" within the meaning of this section must be considered as having been made at

C. A. 1885 *In re* MANNING. Cotton, L.J.

the time it was pronounced by the Registrar, that is to say, on the 2nd of May. It may be there were irregularities, and what ought to have been done has not been done; but that does not enable us to depart from the clear words of the Act, which says that after a receiving order has been made no creditor shall have any remedy against the property or person of the debtor. Here at the time the debtor was attached there was a receiving order against him; how then can we say, looking at the words of the Act, that Mr. Justice *Kay* was wrong in discharging him?

The only other point to consider is whether, after an order of attachment has been made against a man by his consent, he can object to the process being issued under that order. Now here the order of attachment was made on Mr. *Manning* "by his counsel submitting" to it. That was an improper course for him to take if he meant to raise the present question, but we cannot say, having regard to the terms of the Act, that he is not entitled to raise that question now. I am, therefore, of opinion that Mr. Justice *Kay* was right, but in consequence of what was done we give Mr. *Manning* no costs of this appeal.

LINDLEY, L.J.:—

In my opinion the receiving order was made when it was made, though it was not put into shape and signed until some time afterwards. The section is express. The order having been made, there were no legal means of putting Mr. *Manning* in prison. He has, no doubt, embarrassed the case by submitting to the order of attachment; but, putting that as high as it can be put, the Court has no power at all in such a case as this to send a man to gaol, even if he is willing to go. In my opinion, therefore, the appeal must be dismissed, but without costs.

Solicitors: *Nelson & Son; Lawrance, Baker, & Waldron.*

G. I. F. C.

In re AINSLIE.
SWINBURN *v.* AINSLIE.

C. A. 1885 Aug. 7.

[1884 A. 504.]

Windfalls—Larch Trees—Real and Personal Estate—Tenant for Life.

A testator devised estates upon which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales.

It was *held* by *Pearson*, J., that as between the devisees and the executors of the testator the trees which had been blown down to such an extent that they could not grow as trees usually grow were severed and belonged to the executors, and that the trees which were merely lifted but would have to be cut for the proper cultivation of the plantations belonged to the devisees :—

But, *held*, by the Court of Appeal, in allowing an appeal, that, having regard to the maxim "*quicquid plantatur solo, solo cedit*," the principle applicable was that if a tree was attached to the soil it was real estate, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree.

THIS was an appeal from a decision of Mr. Justice *Pearson*.

The facts of the case, which are fully stated in the report of the hearing in the Court below (1) were shortly as follows :—

Mr. *Montague Ainslie*, who was owner in fee of certain estates upon which there were large plantations of larch trees, by his will devised those estates in settlement. After the date of his will, and very shortly before his death, a great number of the larch trees were more or less blown down by extraordinary gales, and the question arose between Mr. *Ainslie's* executors and the devisees under the will whether the trees so blown down belonged to the executors as personal estate of the testator, or whether they passed as part of the inheritance to the devisees.

Upon a summons taken out by one of the executors to determine this question, it was held by Mr. Justice *Pearson* that the trees which had been blown down to such an extent that they could not grow as trees usually grow were severed and belonged

(1) 28 Ch. D. 89.

C. A. 1885

In re AINSLIE SWINBURN *v.* AINSLIE.

to the executors, and that the trees which were simply lifted, but would have to be cut for the proper cultivation of the plantations, belonged to the tenant for life under the will.

The tenant for life appealed.

Cozens-Hardy, Q.C., and *Pauli*, for the Appellant:—

Only such trees as are actually severed from the inheritance can belong to the executors, and the consideration whether any particular trees can or cannot continue to grow in the position in which the gales have left them supplies no true test in answering the question whether such trees are realty or personalty.

Cookson, Q.C., and *Ribton*, for the executors:—

The death of the testator in this case followed so soon after the gale that he had no opportunity of indicating what his intentions were with reference to these blown down trees. The case is in some respects a new one, and the principle to be applied to it is that of the maxim "*quicquid plantatur solo, solo cedit*": *Wentworth* on Executors (1). The other side ask the Court to say that absolute and complete severance is necessary, and that even if a tree is entirely prostrate, in case there is a sucker or filament by which there is adhesion to the soil the tree is attached to the inheritance. But, as the Court knows, larch trees have no tap roots; they spread their roots laterally, so that when blown down there is seen a flat mass which forms the root, usually with earth clinging to it, and usually also with some filaments in the earth on the under side. So that the question really is, whether or not there has been such a severance that the thing is more a chattel than a tree. The proper direction, therefore, is that the tree must to all intents and purposes be absolutely severed from the soil, which is the effect of the decision of the Court below.

LORD HALSBURY, L.C. (without calling for a reply):—

I am of opinion that the judgment of the learned Judge in the Court below cannot be supported. The broad proposition is this—and it presents itself in this case in the most naked form—that

(1) 14th Ed. p. 145.

if the trees in question are attached to and form part of the soil, they are realty; if they are severed from the soil they are personalty. I for my own part am unable to frame words which will express this proposition more clearly than the familiar maxim, "*quicquid plantatur solo, solo cedit.*" The degree and extent to which a tree may form part of the soil by reason of the attachment of its roots, is in every case a question of fact; and in what I am about to say I am not in the least endeavouring to lay down a principle. But as an illustration I may say that if a tree is so fixed to the ground that it would be necessary to apply some new force in order to remove it from the ground, then it would be attached to the soil. If the roots were broken in the soil, so that the tree and its roots were in truth and in fact severed from each other, then, although some of the broken parts of the tree might still remain covered with earth, I should say that it would be in truth and in fact severed, although to the casual observer it would seem to have some of the roots in the ground. It is substantially understood what the roots of a tree are; but of course the word "root" might be refined upon until every minute filament that grows from the tree to the ground might be considered a root. Were I sitting as a judge of fact I should say that if the only connection between the soil and a tree was some minute filament, then that such tree was not fixed to the soil at all. But beyond that I decline to attempt to draw the intermediate line that Mr. *Cookson* invited us to draw between something that is not fixed to the soil and something that looks like it, and which may one of these days become fixed to the soil. The broad proposition is that if the tree is severed, it belongs to the executors, but if it is not severed it belongs to the inheritance. That is the only direction that I will acquiesce in giving.

Now with respect to the direction of the learned Judge below upon this point, I am wholly unable to take it even as a criterion. A tree may grow in a way that trees do not ordinarily grow, and yet be as firmly fixed in the soil as ever it was in the course of its tree life. Again, a tree may be absolutely dead and yet undoubtedly form part of the soil. So the question of the life of the tree seems immaterial. The question, and the only question,

C. A. 1885 *In re* AINSLIE. SWINBURN *v.* AINSLIE.

put in the baldest and broadest form is, whether or not the tree is affixed to the soil. If it is, it is realty, but if it is severed, it is personalty.

COTTON, L.J.:—

I am of the same opinion. The learned Judge in the Court below sought to lay down the principle on which the question in this case was to be decided, by saying that the trees which were in consequence of these gales in such a position that they could not grow as trees naturally would grow were personalty. In my opinion that is a wrong principle and a wrong test. The question is, not whether a particular tree can grow as a tree naturally would grow, but whether it is fixed to the freehold. Larch trees naturally grow upright, but it may well be that a larch tree is absolutely fixed to the soil, though it may grow in a position in which if the wind had not occurred it would not have naturally grown. That is not the test. All we can do is to say that trees which are severed from the soil are personal estate, and trees which are not severed belong to the inheritance. The life and growth certainly afford no test as to whether a tree is or is not affixed to the soil. Subject to what the Lord Chancellor may say, we should, I think, substitute for that made in the Court below, the following declaration, viz., That the trees which had on the 1st of February, 1884, been blown down so as to be severed from the soil form part of the personal estate, and that all others are part of the inheritance. It is a question as regards each particular tree, whether there is such a connection as to prevent the tree being severed from the ground, and that declaration will lay down the principle to be applied. If there was a broken bit of root joining the tree with the soil, I should think it would be difficult to say that the tree was not severed.

LINDLEY, L.J.:—

I am of the same opinion. But for the accident of this storm the executors would have no more to do with these trees than I have. It is for them to make out that the trees belong to them.

They can only make that out by shewing that the trees were severed—that they were detached from the soil. Supposing the trees were blasted the executors would have had nothing to do with them. I think that the test which has been suggested is the one to be adopted in place of the test applied by the learned Judge in the Court below, and that the appeal must be allowed.

Solicitors for all parties: *Mills, Dowson, & Co.*

W. W. K.

V.-C. B.

1885

Feb. 17, 18, 19; *March* 2, 11.

SMETHURST *v.* HASTINGS.

[1884 S. 2172.]

Trustee and Cestui que Trust—Investment—Sub-mortgage—Building Estate—Speculative Security—Separate Mortgages—Breach of Trust—Transfer of Securities—Executors—Waiver—Adoption and Acquiescence.

Under a settlement *S.* was tenant for life with an ultimate trust, in default of children (which happened), for her testamentary appointees. The trustees, having power to invest on leasehold securities, invested the trust funds, with *S.'s* consent, on separate sub-mortgages of leasehold houses, unfinished and unlet, on a building estate of which the roads and drainage were in a defective condition. The investment was made without an independent or reliable valuation, and more than half the value of the house was lent on each sub-mortgage. *S.* died, having by will disposed of the trust funds and appointed executors. The executors, with the sanction of the Chief Clerk in an action establishing *S.'s* testamentary appointment, had the sub-mortgages transferred to them by the trustees, and subsequently, finding them an insufficient security, brought an action against the trustees to make them personally liable for the deficiency:—

Held, that, although the sub-mortgages were not improper investments in point of form, the trustees, having invested the trust funds on insufficient security of a speculative character, and without proper precautions, must make good the loss; and that the executors, having taken the transfers in ignorance of the circumstances attending the investment, were not bound by adoption or acquiescence.

THIS was an action by the executors of Mrs. *Theresa Smethurst*, deceased, against the trustees of a post-nuptial settlement made in her favour, to compel them to make good the loss occasioned by an alleged improper investment of the trust funds.

The settlement was dated the 11th of November, 1875, and was made between *George Willoughby Osborne* (the settlor) of the first part, the said *Theresa Smethurst*, then the wife of *Augustus William Smethurst*, of the second part, and the trustees of the third part. It declared that the trustees should stand possessed of a sum of £10,767 3*s.* 3*d.* Reduced £3 per cent. Annuities, transferred into their names by the said *G. W. Osborne*, upon trust either to permit the same to remain in its actual state of investment, or at any time, with the consent of the said *Theresa Smethurst*, to sell the same and invest the proceeds in their names in or upon (amongst other securities) leasehold or chattel real securities in

England, and to pay the income to the said *Theresa Smethurst* during her life, but during the joint lives of herself and her then present husband, for her separate use; and after her death to stand possessed of the trust funds for her children, and in default of children upon trust for such persons as she should by will appoint.

Mrs. *Smethurst* died on the 6th of October, 1881, having by her will dated the 15th of September, 1881, appointed (she having had no children) the whole of the trust funds as therein mentioned, and appointed her husband, *Augustus William Smethurst*, and *John Cole Stogdon* her executors, who duly proved the will.

The investment complained of was made shortly before Mrs. *Smethurst's* death. In May, 1881, in order to provide a larger income for Mrs. *Smethurst*, the tenant for life, the trustees, with her consent, sold out the settlement funds, and on the 10th of May, 1881, invested part of the proceeds, amounting to £7535, upon separate sub-mortgages of eleven leasehold houses on the *Bedford Park* estate, *Turnham Green, Middlesex*. These sub-mortgages were all in the same form. Each recited a lease from the Ecclesiastical Commissioners by the direction of Mr. *Carr* to *Wheeler*, the builder of the houses, at a ground rent, a mortgage of that lease by *Wheeler* to *Carr*, in common form, with the usual covenants and power of sale, and then the loan by the trustees to *Carr*, for securing which *Carr* made a sub-mortgage to the trustees, the amount of the loan on the sub-mortgage being the same as on the original mortgage. The sub-mortgage contained a covenant by *Carr* for payment of the principal money with interest at 5 per cent., and an assignment by him of the original power of sale. The money advanced to *Carr* was to enable him to carry on building operations on the estate. One of the sub-mortgages was subsequently paid off, the total amount of the mortgage debt being thus reduced to £6885.

At the date of the sub-mortgages the *Bedford Park* estate was not fully developed; the roads, though laid out, were not completed, and they were much cut up by the building operations in progress. The drainage of the houses already built on the estate was also in a defective condition. The houses comprised in the

V.-C. B. 1885 SMETHURST v. HASTINGS.

sub-mortgages were in the fancy style of architecture known as the "*Queen Anne*," were unlet, and not completely finished.

The interest on the sub-mortgages was duly paid by *Carr* until April, 1882, since which time no interest had been paid, *Carr* having become insolvent.

On the 18th of December, 1883, Mrs. *Smethurst's* executors had the sub-mortgages transferred to them by the trustees, and thereupon entered into possession of the property.

Finding they were unable to realize their securities, the property being practically unsaleable, the executors, on the 22nd of May, 1884, commenced this action against the trustees, alleging that since the transfer they, the Plaintiffs, had discovered that the houses were a wholly insufficient security for the sum advanced and unfit for the investment of trust funds: that they were of an entirely speculative value, being only lately erected on part of an estate recently laid out for building, and of a style not likely to form a readily marketable property: that the selling value of the houses was in fact less than the several sums advanced thereon: and that the Defendants made the advance negligently and without proper inquiries or valuations, or taking any other precautions proper to be taken by trustees on advancing trust funds on the security of leasehold property. The Plaintiffs accordingly claimed payment by the Defendants of the £6885 with interest at 5 per cent. per annum from the date of the investment, less any sum paid to Mrs. *Smethurst* or the Plaintiffs on account of such interest, the Plaintiffs submitting on such payment to transfer the securities to the Defendants: and, in the alternative, that the sub-mortgages might be got in and realized for the benefit of the Plaintiffs, and that the Defendants might make good the loss arising from the investments.

In their statement of defence the Defendants alleged that prior to the advance, and with Mrs. *Smethurst's* privity, a proper valuation was made of the property: that in an action brought to obtain the opinion of the Court as to the effect of Mrs. *Smethurst's* testamentary appointment, and in which it had been declared that the appointment operated as a good appointment of the trust funds, an order was made by the Chief Clerk, on the application of the Plaintiffs, giving them leave to accept the transfers of the

sub-mortgages: that the Plaintiffs took and accepted the transfers without any pressure by the Defendants, and with knowledge of all the circumstances connected with the investment of the trust funds and without reserving any rights, and had by so doing adopted and acquiesced in the investment, and waived any objection which might have been made thereto, and any right which they otherwise might have had against the Defendants with regard to such investment: that if the sub-mortgages had not been so taken out of their hands, the Defendants would have been enabled to realize the securities to advantage, and that as the Plaintiffs had allowed the proper time for realization to pass, the Defendants could not now be restored to the same position they would have occupied with regard to the mortgaged property if no transfers had been made. They denied that the houses were of an entirely speculative character, and asserted that at the time of the investment the *Bedford Park* estate was fashionable, and there was every reason to suppose that all the mortgaged houses would speedily let. They also insisted that they had acted with respect to the investment properly, without negligence, *bonâ fide*, and with reasonable care and diligence, and that they had followed the usual and regular course of business pursued by ordinary prudent men in making such investment.

The Plaintiffs in reply denied that they were in any way acquainted with the circumstances relating to the investment until long after Mrs. *Smethurst's* death, and the transfers of the sub-mortgages. They also denied adoption or acquiescence.

Issue having been joined, the action now came on for trial.

A large amount of evidence, both oral and documentary, was adduced on both sides. It was not disputed that the Defendants had advanced more than half the estimated value of the property, but the evidence was conflicting as to whether the valuation made by a Mr. *Goldring*, on which the Defendants acted, was an independent one made on their own account or was first obtained by *Carr*, the sub-mortgagor, for his own purposes, and then accepted as sufficient by the Defendants. It was proved, however, that the value of the mortgaged property was very considerably less than that stated in *Goldring's* valuation. It was also proved that the houses were not only unlet but unfinished, and that

V.-C. B. 1885 SMETHURST v. HASTINGS.

several of them had gone out of repair owing to their having remained unoccupied; that the drainage was defective and the roads in a bad condition; that the houses had become unsaleable, and that there was no immediate prospect of their being let. The further effect of the evidence sufficiently appears from his Lordship's judgment.

Marten, Q.C., and *Dauney*, for the Plaintiffs:—

The evidence shews that the Defendants, in neglect of their duty as trustees, failed to have a proper and independent valuation made of the mortgaged property: consequently, the security having proved deficient, they are personally liable for the loss: *Ingle* v. *Partridge* (1); *Fry* v. *Tapson* (2); *Hoey* v. *Green* (before Mr. Justice *Pearson*, 3rd Dec., 1884); *Mant* v. *Leith* (3).

Again, the investment on sub-mortgage, and on separate securities, was improper.

Davey, Q.C., and *Oswald*, for the Defendants:—

The Plaintiffs took the transfers of the securities with full knowledge of all the circumstances. Having adopted the securities by taking transfers, they cannot now repudiate them and throw them back upon the trustees. They are bound by adoption and acquiescence: *Walker* v. *Symonds* (4); *Harden* v. *Parsons* (5); *Thompson* v. *Finch* (6); *Stevens* v. *Robertson* (7); *In re Hallett's Estate* (8); *Butler* v. *Butler* (9); *Life Association of Scotland* v. *Siddal* (10).

As regards the sanction of the transfers by the Chief Clerk in the administration action, we were not parties to, and had nothing to do with, that action. The Chief Clerk's sanction may give the executors an indemnity against their *cestuis que trust*, but it does not alter the quality of the act sanctioned: it is as much adoption whether the transfers were sanctioned by the Chief Clerk or not: *Boswell* v. *Coaks* (11); *Brooke* v. *Lord Mostyn* (12). If the

(1) 34 Beav. 411.
(2) 28 Ch. D. 268.
(3) 15 Beav. 524.
(4) 3 Sw. 1, 64.
(5) 1 Eden, 145.
(6) 22 Beav. 316.
(7) 37 L. J. (Ch.) 499.
(8) 13 Ch. D. 696.
(9) 5 Ch. D. 554.
(10) 3 D. F. & J. 58, 72.
(11) 27 Ch. D. 424.
(12) 2 D. J. & S. 373.

Plaintiffs say "we are only executors and trustees, not *cestuis que trust*, and therefore cannot be bound by adoption or acquiescence," we answer: "We have nothing to do with your *cestuis que trust*: you are the only parties to represent the trust fund, and, so far as regards the settlement and your right to demand a transfer from us, you are the only *cestuis que trust*."

Moreover, the Plaintiffs cannot compel us to take back the securities unless they can restore us to the position in which we stood at the time we made the transfers. This they cannot do for they have allowed the opportunity for an advantageous sale to pass by.

In making the investment we acted honestly and in the regular course of business, and with Mrs. *Smethurst's* consent: *Speight* v. *Gaunt* (1); *In re Godfrey* (2); *Jones* v. *Lewis* (3); *Lewin* on Trusts (4). It was no breach of trust to invest on sub-mortgage, and no authority has been cited to that effect. On the contrary, a sub-mortgage may afford a double security, for you get not only the covenant of your own mortgagor, but also, by the assignment of the original mortgage debt, the benefit of the covenant by the original mortgagor, and you also have the benefit of the power of sale in both mortgages. Again, the costs of and incident to the sub-mortgage can be charged against the original mortgagor and on the original security.

Marten, in reply:—

A sub-mortgage is not a security upon the property originally mortgaged, but only upon the money due under the original mortgage. Being only a mortgage of a mortgage debt, it is nothing more than a personal security, and here the trustees had no power to invest on such a security. As to adoption and acquiescence, the evidence shews that the executors were not aware, when they took the transfers, of the whole of the circumstances under which the investment was made.

1885. Mar. 11. BACON, V.-C. (after stating the issues between the parties, and the facts of the case, said that it was not clear

(1) 9 App. Cas. 1.
(2) 23 Ch. D. 483.
(3) 3 De G. & Sm. 471.
(4) 7th Ed. p. 298, note (f).

V.-C. B. 1885 SMETHURST v. HASTINGS.

upon the evidence (*Carr* the mortgagor not having been called as a witness) whether *Goldring's* valuation was made on behalf of the mortgagor or the mortgagees, though the tone of the document, omitting, as it did, deductions for insurance, repairs, &c., indicated that it had been made in the interests rather of a borrower than a lender. His Lordship then proceeded:—)

The correspondence between Mrs. *Smethurst* and the Defendants, her trustees, is put in evidence, from which it appears that, upon the representations made to her, she gave her consent and approbation to the proposed investment, but it is equally clear that she did so in full reliance upon the discharge by the Defendants of the duties they had undertaken. The houses mentioned in Mr. *Goldring's* report had at this time been built, but none of them had been completely finished, the painting and papering being yet to be done. None of them had been let or were occupied; the roads had been laid out, but were not completed and were not practically usable by reason of the frequent passage of carts used for the transport of materials supplied in the somewhat extensive building operations in progress on the other parts of the estate, and there was no sufficient drainage from the existing houses. In this state of circumstances the Defendants agreed to lend to Mr. *Carr* the trust moneys then in their hands, amounting to £7535, on the security of eleven of the houses, and took as security the mortgages mentioned in the pleadings, one of which has since been paid off, thus reducing the amount so secured to £6885. The mortgages were eleven in number and were all in the same form. Each of them recites a lease from the Ecclesiastical Commissioners by the direction of *Carr* to *Wheeler*, the builder of the houses, at a ground rent; a mortgage of that lease made by the builder to *Carr* with the usual covenants and power of sale; and then the loan by the trustees to *Carr*, for securing which *Carr* makes a sub-mortgage to the trustees. It has been suggested by the Plaintiffs that this form of security is objectionable, but I do not know that it is a matter of any importance so far as relates to the mere form of the security, since it contains *Carr's* covenant for payment and an assignment of the original power of sale. The serious objection, however, of the Plaintiffs is that the leasehold houses so mortgaged were a wholly

insufficient security for the sums advanced, and unfit for the investment of trust funds—that, being only in course of erection or recently erected, they were of merely speculative value, not of readily marketable value, and that their selling value was less than the several sums advanced. Besides the general facts I have adverted to, the Plaintiffs have proved by evidence that the value of the property included in the mortgages in question was very considerably less than that stated in the valuation upon which the Defendants acted. [His Lordship, having then referred to the evidence of the surveyors called on both sides as to the value of the property, proceeded:—] For some time after the advancement of the trust money the interest was paid, but none has been paid since April, 1882. The cheque for interest given by *Carr*, the mortgagor, was dishonoured in November, 1883, and the Plaintiffs, as representatives of Mrs. *Smethurst*, then required the Defendants to transfer to them the securities which they held. This was done in December, 1883, and the Plaintiffs thereupon entered into possession of the property. Upon this fact the Defendants rely as one of their grounds of defence to the present action. They plead that the Plaintiffs accepted the transfers without pressure by the Defendants, with knowledge of all the circumstances connected with the investment of the trust funds, and that by so doing they adopted and acquiesced in the securities and waived any objection and any right which they otherwise might have had against the Defendants with regard to the investment.

A multitude of cases have been cited in support of this contention; but although it is unquestionably the law that a person who, with full knowledge of the facts existing, so assents to and acts upon what has been wrongfully done and thereby alters or affects prejudicially the rights of the person whose conduct he impeaches as that he cannot restore that person to the rights of which by the acquiescence he has been deprived, cannot maintain his impeachment, yet no such principle has any application to the case before me. All that the Plaintiffs did was to possess themselves, as far as they could, of the securities, such as they were, and which were their property. There is no pretence for

V.-C. B. 1885 SMETHURST v. HASTINGS.

the allegation that they knew of the circumstances under which the investments had been made. They offer and are willing to re-transfer the mortgages to the Defendants and to account for all that the Plaintiffs have been able to receive under them, upon being paid the amounts which, as they say, were improperly invested, with interest thereon; and the Defendants' interests, whatever they may be, are in no respect injured or prejudicially affected by the transfer of the mortgages. This ground of defence therefore is, in my opinion, wholly untenable.

The further topic of defence, and that which appears to be mainly relied on, is that the Defendants procured a proper valuation to be made by competent surveyors with the privity of Mrs. *Smethurst* before any money was advanced by them upon the securities, and that they made all proper inquiries and took all precautions proper to be taken by trustees advancing trust funds on the security of leasehold property. Having already adverted to the evidence on these subjects, I am compelled to say that these allegations are not supported. I take it to be proved that there was no proper valuation made, no proper inquiries or precautions taken before the advances, and that the amount of the advances was largely in excess of the proportion in which trustees are justified in venturing upon such securities.

Some cases were referred to in which trustees have been held not to be liable for losses sustained during their dealings with trust funds, and it has been said—perhaps truly—that of late the Courts have been less severe than they were in former times in fixing trustees personally with such losses; but there is one clear, homely, intelligible, but inflexible rule which has never been departed from in times ancient or modern, viz., that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property. Applying that rule to the present case, can it be said that any prudent man, having to invest nearly £7000 upon leasehold property with a view to present income (as was Mrs. *Smethurst's* plainly-expressed desire), would venture his money to the extent of more than half the estimated value of the property, when that property consisted of houses recently built, unoccupied, not wholly finished, producing

no fixed certain rents, burdened with ground-rents and insurances, liable for future repairs, imperfectly drained, and without proper roads? I do not leave out of consideration the fact agreed to on all sides that the property has undergone a considerable depreciation in value since the advances were made. There has been a dispute and litigation between the parishes of *Acton* and *Chiswick*, in which the *Bedford Park* estate is situate, respecting one general drainage scheme, the result of which has been to some extent damaging to the property. That what are called "*Queen Anne* houses" have ceased to be as attractive as from their novelty they once were; that the *Bedford Park* estate was at the time of the advances "fashionable," as the Defendants say; that there was some reason to suppose that all the mortgaged houses would speedily let, and that the taste or fashion has changed—none of these considerations can or ought to avail the Defendants, or to take away from the investments that merely speculative character which is inseparable from them.

Upon the whole case, and having regard to the facts which are undisputed, I am of opinion that the investment of the several sums composing the aggregate trust funds upon eleven mortgages of houses which would not be immediately occupied and from which rents were not secured nor receivable, was a breach of the duties of the trustees and a violation of the rule which requires trustees to deal with their trust funds as a prudent man would deal with his own property. The decree, therefore, must contain an order for the present payment by the Defendants to the Plaintiffs of the sum of £6885, and an account and inquiry as to the amount of interest upon that sum from the time of its investment at 5 per cent. per annum, after giving credit to the Defendants for all sums which have been paid in respect of such interest; and an order on the Plaintiffs to transfer to the Defendants the existing mortgages and to account for all rents received by them since they took possession, after deducting all sums properly paid by them for ground-rents, insurances, and repairs; the balance upon the last-mentioned account to be deducted from the amount which shall be found to be payable by the Defendants in respect of interest, and the Defendants to pay the costs of the action up

V.-C. B. 1885 SMETHURST v. HASTINGS.

to the trial; and there will be liberty to apply as to subsequent costs, which are reserved.

The Defendants gave notice of appeal from this decision, and the appeal was set down but did not come on for hearing, the action being compromised.

Solicitors for Plaintiffs: *Kaye & Guedalla.*
Solicitors for Defendants: *Clarke, Rawlins, & Co.*

G. I. F. C.

V.-C. B. 1885 *Aug.* 3.

DAWES *v.* CREYKE.

[1884 D. 2578.]

Husband and Wife—Settlement—After-acquired Property—Covenant—Judicial Separation, Decree for—"Feme Sole"—20 & 21 Vict. c. 85, *ss.* 7, 21, 25, 26 [*Revised Ed. Statutes, vol xiii. pp.* 252–255].

A married woman, subsequently to obtaining a decree of judicial separation from her husband, became absolutely entitled to certain sums of stock:—

Held, that under 20 & 21 Vict. c. 85, s. 25, the stock belonged to her as if she were a *feme sole*, and was not included in a covenant in her marriage settlement to settle all property which she or her husband in her right might acquire "during the coverture."

BY the settlement dated the 15th of September, 1880, and made prior to the marriage of Miss *Hilda Creyke* with *Charles Dawes*, certain property belonging to Miss *Creyke* was settled upon the trusts therein mentioned; and the settlement contained the following agreement: "And it is hereby agreed and declared that if the said *Hilda Creyke* now is, or if during the said intended coverture she or the said *Charles Dawes* in her right shall become, seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever in possession, reversion, remainder, or expectancy (other than the premises hereinbefore expressed to be hereby assigned, and except property which accruing at one and the same time and from one and the

same source shall not amount to or be of the value of £200, and except jewels, &c., all which excepted premises it is hereby declared shall belong to the said *Hilda Creyke* for her separate use), then and in every such case the said *Hilda Creyke* and *Charles Dawes* and other necessary parties," would settle such real and personal property as therein mentioned.

On the 16th of November, 1883, Mrs. *Dawes* obtained from the Probate, Divorce and Admiralty Division a decree of judicial separation from her husband, and she and her husband were now living separate.

On the 11th of December, 1883, that is, subsequently to the separation decree, Mrs. *Dawes*' paternal grandfather, Archdeacon *Creyke*, died, whereupon, under his marriage settlement and a testamentary appointment made by him thereunder, Mrs. *Dawes* became absolutely entitled to a share of the trust funds comprised in such settlement; and in July, 1884, the trustees of that settlement transferred, in satisfaction of such share, certain sums of stock, amounting to about £650, to the trustees of Mrs. *Dawes*' marriage settlement.

The question, raised upon the further consideration of an action by Mrs. *Dawes* against her trustees and her husband for the execution of the trusts of her settlement, was whether, having regard to the separation decree, the sums of stock belonged to Mrs. *Dawes* absolutely for her separate use, or whether they passed under the covenant to settle after-acquired property contained in her settlement.

Northmore Lawrence, and *Swinfen Eady*, for the Plaintiff, Mrs. *Dawes*:—

The question is, what was the effect of the separation decree upon the covenant to settle after-acquired property? The *Divorce and Matrimonial Causes Act*, 1857 (20 & 21 Vict. c. 85), s. 7, substitutes a decree for judicial separation for the old decree of divorce *à mensâ et thoro*. Then sect. 25 is as follows: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her;

V.-C. B. 1885 DAWES v. CREYKE.

and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate." Then sect. 26 says that, "in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding."

We submit, therefore, that, under the Act, in consequence of the decree for judicial separation, the covenant has ceased to have any operation, and that the property in question now belongs to Mrs. *Dawes* "as a *feme sole*."

There does not appear to be any authority on the exact point; but in *Munt* v. *Glynes* (1) Lord *Romilly*, M.R., held that a restraint on anticipation did not apply to a wife separated from her husband by a decree for judicial separation. Again, in *Cooke* v. *Fuller* (2) it was held that, a protection order having been obtained by the wife under sect. 21 on her desertion by her husband, she was entitled to payment of a fund which had been subsequently bequeathed to her for her separate use without power of anticipation, on the ground that under that section she was in the same position as regards property as if "she had obtained a decree for judicial separation."

So, in *In re Coward and Adam's Purchase* (3), it was held that a married woman could give a good discharge for a legacy to which she became entitled subsequently to the date of a protection order. With regard to a wife's *choses in action* not reduced into possession at the date of a decree of judicial separation, the effect of the decree is, under sect. 25, to vest them absolutely in the wife as if she were a *feme sole*: *Johnson* v. *Lander* (4). An absolute covenant to settle after-acquired property is always cut down so as to include only property acquired during actual

(1) 20 W. R. 823.
(2) 26 Beav. 99.
(3) Law Rep. 20 Eq. 179.
(4) Ibid. 7 Eq. 228.

coverture: *In re Edwards* (1); the object of the covenant being to intercept the marital control: but here the covenant in terms applies only to actual coverture. If the wife gets into the position of a "*feme sole*," the necessity for the covenant is gone, and it becomes inoperative. We submit therefore that the funds in question belong to Mrs. *Dawes* absolutely, and are not bound by the covenant.

Spence, for the Defendant, *Charles Dawes*:—

The Act does not say that property devolving on the wife after the separation decree shall belong to her for her separate use, but only "as a *feme sole*."

Now, Mrs. *Dawes* as a *feme sole* contracted prior to her marriage to deal with her property in a certain way, and there is nothing in the Act annulling such a contract. The Act only deals with cases where there has been no contract affecting the wife's property. This seems to have been the view taken of the Act in *Ewart* v. *Chubb* (2), where Vice-Chancellor *Hall* required an affidavit of no settlement before allowing a wife's fund to be paid to her, although she had obtained a protection order under the 21st section. I submit that the wife is still under coverture within the meaning of the covenant. Notwithstanding the separation decree she is still "a married woman," as Lord *Romilly* remarked in *Munt* v. *Glynes* (3); and the covenant applies so long as that *status* continues.

Macaskie, for the trustees.

BACON, V.-C.:—

In my opinion the words of the Act are conclusive, and no other construction can be put upon them than that contended for on behalf of the Plaintiff. The Act says that upon a separation decree being made the wife shall from the date of the decree become entitled to property of every kind that may come to her as if she were a *feme sole*. If in the present case Mrs. *Dawes* had been a *feme sole* she would have been entitled to

(1) Law Rep. 9 Ch. 97. (2) Law Rep. 20 Eq. 454.
(3) 20 W. R. 823.

V.-C. B. 1885 DAWES v. CREYKE.

receive this money, and according to the Act she is to be treated as a *feme sole*. The Act is clear. The separation decree does not put an end for all purposes to a contract made upon marriage, for the husband and wife may be reconciled. Notwithstanding the decree, the wife remains bound by her marriage contract in the sense that she cannot enter into another contract for marriage; she and her husband may come together again; but while the decree for judicial separation continues, as in this case, the woman is entitled to any fund which may come to her, as if she were a *feme sole*. The fact that Mrs. *Dawes* entered into this covenant before her marriage is immaterial. The effect of the covenant, standing by itself, would be to vest the property in the trustees upon the trusts of the settlement; but it has become wholly inoperative under the separation decree, so long as the decree continues.

I therefore decide that, in accordance with the Act of Parliament, Mrs. *Dawes* shall enjoy the stock in question in the same manner in all respects as if she were a *feme sole*.

Solicitors: *Nash & Field; Robinson & Dees; J. Graham.*

G. I. F. C.

In re APPLICATION TO REGISTER THE TRADE-MARK "WHITE ROSE."

KAY, J.

1885

June 3.

Trade-mark—Registration—Similarity—Old Mark—Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 62.

An application made in November, 1884, by an American firm of oil manufacturers for the registration under the Act of 1883 of a trade-mark for illuminating oils, which mark had been used by them in *America* since 1872, and had been known in *England* as the "*White Rose*" mark prior to 1875, was refused by the Comptroller upon the ground that there had been on the register since 1878 a similar mark for illuminating oils called the "*Rosaline*" mark, of which an English firm were the proprietors:—

Held, that although there was enough similarity between the two marks to render it possible for the public to mistake the one for the other, yet as the "*White Rose*" was to all intents and purposes an old mark, it ought to be admitted to registration.

THIS was an application by summons under the *Trade-marks Act*, 1883, s. 62, sub-s. 5, that the Comptroller might be directed to proceed with the registration of a trade-mark known as the "*White Rose*" mark belonging to the applicants, an American firm of oil manufacturers at *New York*, who carry on business under the name of the *Sone & Fleming Manufacturing Company*.

The applicants had in September, 1881, registered the "*White Rose*" mark in *America* in respect of illuminating oils manufactured by them, and in November, 1884, they made an application under the *Trade-marks Act*, 1883, s. 62, to register the same mark in respect of their oils in *England*. The Comptroller, however, refused to register it upon the ground that there had been on the register since August, 1877, a trade-mark of a similar character, also for illuminating oils, called "*Rosaline*," of which Messrs. *E. J. Rowe & Co.*, a firm of oil manufacturers at *Exeter*, were the proprietors.

The "*White Rose*" mark consisted of the representation of a rose inclosed in a circle formed by the words "*White Rose. Sone & Fleming Manufacturing Co.*"

The *Rosaline* mark consisted of the words "*Rosaline* Oil," printed across the middle of a circle, with the representation of a

KAY, J. 1885

In re APPLICATION TO REGISTER THE TRADE-MARK "WHITE ROSE."

small rose both above and below those words, and "*R. & Co.*" printed on each side of each rose.

There was evidence that the "*White Rose*" mark had been used by the applicants ever since the year 1872, and that it was well-known in the oil-trade in *England* before the year 1875.

The owners of the "*Rosaline*" mark had been served with the summons, but did not appear.

E. S. Ford, for the Applicants :—

The two marks are not so similar in appearance as to be calculated to deceive persons interested, and, moreover, the *White Rose* is really an old mark, so that it would be a great hardship to the proprietors if registration of it was refused.

Stirling, for the Comptroller :—

The mark which the applicants wish to register is so similar to one already on the register for illuminating oils, *i.e.*, the "*Rosaline*," as to be calculated to deceive within the meaning of sect. 72 of the Act of 1883.

[KAY, J. :—According to the evidence this is an old mark. Can it be admitted to the register without the removal of the mark already registered ?]

The registration of old marks having some degree of similarity is sometimes allowed, and the practice of permitting this gave rise to the Three Mark Rule.

KAY, J. :—

If the mark now sought to be registered were altogether a new mark I should think it better not to allow it to be registered ; for I cannot say that if both marks are upon the register there will be no chance of the one being mistaken for the other, not perhaps by dealers in the trade, but by members of the public who are ignorant of the marks used in the trade. But it appears that the "*Rosaline*" mark was not registered until August, 1877, while the "*White Rose*" mark has been used in this country since 1872, and was well known in the English trade before 1875, so that it would be a positive hardship to the American company to

KAY, J.
1885
In re APPLICATION TO REGISTER THE TRADE-MARK "WHITE ROSE."

compel them to change their mark because another firm has registered a mark somewhat like it.

Under these circumstances I shall direct the Comptroller to proceed with the registration of the mark, but I do so entirely on the footing of this being an old mark, and I do so the more readily because the owners of the registered mark who have been served with notice of the summons do not appear in opposition to the registration. The Comptroller's costs must be paid by the applicants.

Solicitor for Applicants: *Basil E. Greenfield.*
Solicitor for Board of Trade: *Solicitor to Board of Trade.*

W. W. K.

KAY, J.
1885
July 29.

In re WREY.
STUART *v.* WREY.

[1885 W. 1575.]

Will—Bequest—Vested or Contingent—Income until Marriage—Corpus at the Time of Marriage.

A testatrix by her will, after specific bequests of bonds, gave all the rest of her stocks and shares upon trust to pay the income to *G.* until his marriage, and at the time of his marriage to hand over the stocks and shares to him:—

Held, that *G.* took a vested interest under the gift, and, being of age, was entitled to have the stocks and shares comprised therein transferred to him, although he had not married.

Batsford v. *Kebbell* (1) distinguished.

In re Bunn (2) and *Vize* v. *Stoney* (3) observed upon.

ADJOURNED SUMMONS.

Florence Wrey by her will, dated the 13th of March, 1885, appointed her great nephew *G. E. Bourchier Wrey*, and *C. E. Stuart*, and *H. O. Savile*, her executors, and after giving to her nephew *C. J. Wrey* eleven £100 Russian bonds, and to her great nephew *E. Wilson* five £100 Russian bonds, gave all the rest of her stocks and shares, wheresoever or in whatsoever invested, to her

(1) 3 Ves. 363. (2) 16 Ch. D. 47.
(3) 2 D. & Wal. 659; S. C. 1 D. & War. 337.

KAY, J.
1885
In re WREY.
STUART *v.* WREY.

above named executors and trustees "upon trust to pay the dividends and interest thereof to my said great nephew *G. E. B. Wrey* until his marriage, and at the time of his marriage to hand over the stocks and shares to the said *G. E. B. Wrey*." The will contained no general residuary gift.

The testatrix died on the 20th of March, 1885, and her will had been duly proved. Her great nephew *G. E. B. Wrey* survived her, and had attained twenty-one, but had not yet married, and the question was whether his interest in the gift to him of all the rest of the stocks and shares of the testatrix was vested or contingent.

Vaughan Hawkins, for *G. E. B. Wrey*:—

There are no words which sound in contingency, and the income being given until marriage the legacy is vested, although the *corpus* is to be handed over upon marriage: *Vize* v. *Stoney* (1). The residue of the testatrix's stocks and shares is here at once separated from the rest of the estate, and given to the trustees for the benefit of the legatee without any gift over: *Saunders* v. *Vautier* (2); *Re Hart's Trusts* (3); *Jarman* on Wills (4).

[KAY, J., referred to *Booth* v. *Booth* (5).]

Booth v. *Booth* is precisely in point.

[KAY, J., referred to *Boraston's Case* (6) and *Hanson* v. *Graham* (7).]

There is really no distinction in principle between a gift of income until a given age with a direction to hand over the capital at that age, and a gift of income until marriage with a direction to hand over the capital at marriage. The legacy being vested, the legatee, who is of age, is entitled to have the stocks and shares comprised therein transferred to him, although he has never married.

(1) 2 D. & Wal. 659; S.C. 1 D. & War. 337.
(2) Cr. & Ph. 240.
(3) 3 De G. & J. 195.
(4) 4th Ed. p. 843.
(5) 4 Ves. 399.
(6) Tudor, L. C. (Real Property) 3rd Ed. p. 809.
(7) 6 Ves. 239.

Coltman, for the next of kin:—

This is a gift for life or until marriage of the income with a contingent gift of the capital upon an event which has not yet happened. It is not the case of a gift of residue as in *Booth* v. *Booth* (1), which is distinguishable on that ground; nor is it the case of a gift of a legacy with a direction to pay it over at a future time, or upon the happening of a future event, as in *Vize* v. *Stoney* (2), where there was a direct gift followed by a direction delaying the payment. A different class of considerations apply to gifts of income until some given age after twenty-one, where the postponement may be presumed to arise from the disinclination of the testator that the legatee should have the management of his property at an earlier age, and to gifts of income until the happening of a contingency like marriage, which might take place at any time, and would not ensure greater capacity of management on the part of the legatee: *In re Bunn* (3); *Leake* v. *Robinson* (4); *Batsford* v. *Kebbell* (5); *Atkins* v. *Hiccocks* (6). [He also referred to *Spencer* v. *Wilson* (7).]

Vaughan Hawkins, in reply:—

Batsford v. *Kebbell* has been unfavourably criticised and would not now be followed. I rely on *Vize* v. *Stoney*. [He also cited *Elton* v. *Elton* (8); *Dundas* v. *Wolfe-Murray* (9); *Lister* v. *Bradley* (10); *Love* v. *L'Estrange* (11).]

KAY, J.:—

The first observation that occurs upon the words which I have to construe is, that there is a complete separation of the subject of this specific bequest from the rest of the property of the testator for the purpose of effecting this gift; and secondly, that there is no gift over in case the great nephew does not survive the testator, or in case he dies without having married. Thus the

(1) 4 Ves. 399.
(2) 2 D. & Wal. 659; S. C. 1 D. & War. 337.
(3) 16 Ch. D. 47.
(4) 2 Mer. 363.
(5) 3 Ves. 363.
(6) 1 Atk. 500.
(7) Law Rep. 16 Eq. 501.
(8) 3 Atk. 504.
(9) 1 H. & M. 425.
(10) 1 Hare, 10.
(11) 5 Bro. P. C. 59.

KAY, J.
1885
In re WREY.
STUART *v.* WREY.

case is at once distinguishable from *Batsford* v. *Kebbell* (1). There the testatrix gave to the legatee the dividends on £500 3 per cent. annuities until he should attain the age of thirty-two, at which time she directed her executors to transfer to him the principal sum of £500 out of her 3 per cent. annuities for his own use, and it was held that the legacy did not vest until the legatee attained thirty-two. In that case there was no separation of the £500 annuities from the other 3 per cent. annuities of the testatrix until the legatee attained thirty-two, and all that was dealt with in the meantime was the income of that amount of annuities, and not of any particular sum given for the legatee's benefit. The testatrix had a quantity of annuities of the same kind besides the £500, and she gave out of the mass the income of £500, part of it, and for the first time when the legatee attained thirty-two separated the £500 from the mass and directed it to be given to him. That case is entirely distinct from the present, both in the language used and in the manner in which the gift was vested in the legatee. At this day, after the various criticisms which it has received, *Batsford* v. *Kebbell* would not, I think, be followed except in a case which was exactly on all fours with it. This case, as I have said, is not so, as there the testatrix gave the income first as one gift, and then the capital afterwards as a distinct gift when the legatee attained thirty-two. I think, therefore, that this case is not governed by *Batsford* v. *Kebbell*. According to the rule in *Saunders* v. *Vautier* (2), which has been very often followed by the Courts, the presumption in favour of the vesting of a legacy is strengthened when it is separated from the bulk of the estate for the purpose of the gift, and that is done in this case.

The next point is this, the case not being one covered by *Batsford* v. *Kebbell*, this legacy would no doubt be vested if there was a gift of the income to the legatee until he attained twenty-five, or some other age, with a direction that on his attaining that age the capital should be transferred to him. But here there is a direction to pay the income to him until the contingent event of his marriage, and at the time of that contingent event to transfer the capital to him. Does that make any

(1) 3 Ves. 363.

(2) Cr. & Ph. 240.

difference? It may, if the words of the late Master of the Rolls in *In re Bunn* (1), be taken as stating correctly the principle upon which a gift of income up to a given time, and then a gift of principal, is held to be a vested gift. He cites in that case with approval the passage in the first edition of *Theobald* on Wills, at p. 276 (2): "It makes no difference, whether the interest is first given up to a given time and then the principal, or *vice versâ*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier." Of course, if that is the principle, it cannot apply to a case of this kind, for a man would not fix on marriage with any idea that the legatee would upon marrying become more capable of managing his property than he was before, which idea might afford a reason for postponing a gift of principal until a given age, such as twenty-five or thirty-two. That is a distinction with which, I must confess, I am not familiar, and I do not know that it has been drawn in any other case. Turning to *Vize* v. *Stoney* (3), the gift there was of a sum of money to each of three daughters of the testator, with a direction that these sums were to be paid to them respectively on their respective days of marriage, with interest to be computed from the day of his decease to the day of payment. In that case Lord *St. Leonards* (4) held that the legacies were vested, saying that a legacy given to a son at twenty-one, or to a daughter at that age or marriage, is contingent, but that if to such a gift interest is annexed in the meantime, that interest so given dispenses with the contingency, and that, though it still sounded in contingency, it could not so operate; and he asked, "Is there anything then so peculiar in the case before me, or of a contingency upon marriage generally, to prevent my applying this principle to such a case?" I read these words to shew that his opinion was not confined to the words of the particular gift before him, but was the same as to a gift contingent on marriage generally. And he said that, on principle, he could see no difference in operation,

(1) 16 Ch. D. 47.
(2) 2nd Ed. p. 413.
(3) 2 D. & Wal. 659; S. C. 1 D. & War. 337.
(4) 1 D. & War. 337, 350.

KAY, J. 1885 *In re* WREY. STUART *v.* WREY.

where interest in the meantime is given, between cases of gifts on marriage, and gifts at twenty-one. He then refers to *Booth* v. *Booth* (1), and says that he did not rest his decision on that case, as it was expressly decided on the ground of the gift being a gift of residue, which in the case before him it was not; apparently thinking that there was a distinction between the case of a gift of residue and that of a general legacy. Speaking for myself, I think it is not reasonable, and exceedingly inconvenient, to make fine distinctions which do not rest on any broad principle. If the gift in this case were of income until twenty-five, with a direction at that age to transfer the capital to the legatee, it would certainly be vested, and I do not see why it should not be vested where there is a gift of income until marriage with a direction to transfer the capital at that time. I accordingly hold that this legacy is vested, and that Mr. *G. E. B. Wrey* is entitled to have the stocks and shares comprised in the gift transferred to him.

Solicitors: *Farrer & Co.*

W. W. K.

KAY, J. 1885 *July* 22, 23; *Aug.* 3.

WILKS *v.* BANNISTER.

[1871 W. 191.]

Will, Construction of—Bequest to First and Second Cousins—Gift over—Death before Payment of any Legacy.

Testator bequeathed the residue of the proceeds of sale of his real and personal estates upon trust, after the deaths of his wife and sister, to be equally divided amongst all such of his first and second cousins, including his reputed cousin *A. B.* and his children, or reputed children, and the children of his reputed cousin *S. G.* deceased as should be then living, and if *A. B.* should be then dead, the share to which he would have been entitled, if then living, should be divided amongst his then surviving children. And by a codicil, the testator gave a legacy out of the same proceeds of sale "to each of my cousins *J. B.* and *G. C.*," in addition to any sum to which they might be entitled under his will, and directed that if any or either of his first or second cousins should die before the payment of any sum or share thereby or by his will directed to be paid to him or her, such sum or share should be equally divided among his or her wife or husband and

(1) 4 Ves. 399.

children or child, if any, and if none should be paid to his or her next of kin. The testator had not, either at the date of his will or at his death, any second cousin, but at the time of his death he had both first cousins and first cousins once removed, and also first cousins twice removed. *A. B.* and *S. G.*, if they had been legitimate, would have been the testator's first cousins, and *J. B.* and *G. C.* were his first cousins once removed :—

Held, that first cousins once removed and their children were included in the gift :

Held, also, that the gift over on death before payment was to be construed as before becoming entitled to payment.

FURTHER CONSIDERATION.

The action was for the administration of the estate of *James Brown*, who died on the 27th of October, 1849, and who, by will made on the 27th of October, 1845, after appointing three trustees and giving certain legacies, devised and bequeathed all other his real and personal estates (except as therein mentioned) to his trustees, their heirs, executors, and administrators, upon trust to sell and get in the same, and to permit his wife (one of the trustees) during her widowhood to receive the income of one moiety thereof, and to permit his sister, *Phillis Brown* (another of the trustees) during her life to receive the income of the other moiety. The testator directed that on failure of the trust of either of the moieties, that moiety should be subject to the trust affecting the other, and that if his wife or sister should attempt to alien or charge her moiety of the income, the trust of such moiety should be deemed to have failed from the time of such attempt, and on failure of the trusts as to both moieties, he directed that out of the moneys invested, or the investments thereof, the sum of £10 should be paid by the trustees "to each and every of my then surviving first cousins, including my reputed cousin *Andrew Brown*, and that the residue of the moneys or investments shall be equally divided between and amongst all such of my first and second cousins, including my reputed cousin *Andrew Brown* and his children, or reputed children, and the children of my reputed cousin *Sarah Gale*, deceased, late the wife of *William Gale*, as shall be then living, and that if the said *Andrew Brown* shall be then dead, the share to which he would have been entitled, if then living, shall be divided amongst his then surviving children." By a codicil made on the 31st of May,

KAY, J.
1885
WILKS
v.
BANNISTER.

1847, the testator gave a legacy of £100 out of the proceeds of his real and personal estates "to each of my cousins" *Joseph Bannister* and *George Cole*, in addition to any sum to which they might be entitled under his will; and he directed "that if any or either of my first or second cousins shall die before the payment of any sum or share hereby or by my said will directed to be paid to him or her, such sum or share shall be equally divided among his or her wife or husband and children or child, if any, and if none shall be paid to his or her next of kin according to the *Statutes of Distribution*." By another codicil made on the 14th of May, 1849, the testator appointed "my cousin" *Joseph Bannister* an executor and trustee of his will and codicils jointly with the three trustees named in the will.

The will and codicils were proved by *Bridger Wilks*, the third trustee appointed by the will, alone on the 8th of December, 1849. *Phillis Brown*, the sister, died in June, 1857, and the widow of the testator died in January, 1871.

If legitimate *Andrew Brown* and *Sarah Gale* would have been first cousins of the testator.

Joseph Bannister, to whom the testator had referred as "my cousin," was a first cousin once removed. He died in November, 1860, leaving six children, the Defendant *Frederick Bannister* being one of them.

George Cole mentioned above was another first cousin once removed.

The trustees (the Plaintiffs) advertised for persons claiming to be interested under the will and codicils, and 105 sent in claims. On the hearing of the action on the 27th of January, 1872, an inquiry was directed to be made as to who were the first and second cousins and other persons within the sixth degree of consanguinity to the testator who were living at the date of his will and at the time of his death; and at the time of the death of his widow, or at any or which of those times, and whether they were dead, and if so when they died, and who were their personal representatives, and what wife, husband, children, or child they left.

The Chief Clerk, in answer to that inquiry, had placed in his certificate the names of 192 persons. There were no second

cousins, but there were first cousins and first cousins once and twice removed.

The question now, on further consideration, was amongst whom the residue of the proceeds of the estates should be divided.

Hastings, Q.C., and *W. D. Rawlins*, for the Plaintiffs, stated the facts.

Dauney, for the Defendant *Frederick Bannister*, a first cousin twice removed of the testator, submitted that he was in the same degree of relationship to the testator as second cousins, and should be included in the class of beneficiaries: *Silcox* v. *Bell* (1). *In re Parker* (2) was distinguishable, as there the gifts were specifically to first and to second cousins. There were cousins of both classes, and they were entitled to the exclusion of children and grandchildren of first cousins. The testator in this case had included the first and second cousins in one class, and the language used should have a wider meaning given to it. In *Sanderson* v. *Bayley* (3) the testator had no second cousins at either the date of his will or his death, and as in *In re Bonner* (4) a gift to second cousins where there were none was held to include first cousins once removed: *Slade* v. *Fooks* (5). The case of *Charge* v. *Goodyer* (6) was a strong authority for holding that a gift to first and second cousins would include those who were related to the testator in the degree of second cousins. There was nothing in any recent decision to induce the Court to hold that first cousins twice removed were not entitled, though Mr. *Theobald*, in his book on Wills (7), had stated that in *In re Parker* that decision was not approved of.

He also referred to *Mayott* v. *Mayott* (8), but relied on the decisions in *Silcox* v. *Bell*, *Charge* v. *Goodyer*, and *Sanderson* v. *Bayley*, that second cousins in this case should include first cousins twice removed.

[KAY, J., said it was difficult to see how *In re Bonner* could be reconciled with the decisions in the cases of *Silcox* v. *Bell* and *Charge* v. *Goodyer*.]

(1) 1 S. & S. 301.
(2) 15 Ch. D. 528; 17 Ch. D. 262.
(3) 4 My. & Cr. 56.
(4) 19 Ch. D. 201.
(5) 9 Sim. 386.
(6) 3 Russ. 140.
(7) 2nd Ed. p. 259.
(8) 2 Bro. C. C. 125.

KAY, J.
1885
WILKS
v.
BANNISTER.

Vaughan Hawkins, for first cousins once removed, submitted that the testator meant by second cousins those cousins who were in the second degree—first cousins once removed: *Slade* v. *Fooks* (1); *In re Bonner* (2); and that meaning of the language, second cousins, was recognised in *Sanderson* v. *Bayley* (3)—it meant those who were within the degree of second cousin. That construction being adopted, the particular circumstances of this case being considered, the first cousins once removed would be entitled to share in the residue of the estate. A question arose on the gift over in the codicil in the event of cousins dying before the payment of the moneys given to them. It would, he submitted, mean dying before actual receipt of the moneys: *Johnson* v. *Crook* (4).

Dauney submitted that the words should be read so that the gift over should take effect on death before the time specified for payment—the death of the survivor of the wife and sister, and not before the actual receipt of the moneys. It was not like the case of a gift of legacies by the testator to take effect on his own death, as there actual payment might be postponed for a year: *In re Chaston* (5); *In re Wilkins* (6).

KAY, J.:—

I have to construe a gift by will of residue to first and second cousins of the testator who should be living at the death of the survivor of his wife and sister. The testator had no second cousin at the date of his will, or at his death which occurred some years after.

In *Mayott* v. *Mayott* (7), under a similar gift, first cousins and first cousins once removed and a great niece were held to be entitled: the testator there having died a few days after the date of his will, and having no second cousins.

In *Silcox* v. *Bell* (8), where the gift was to relations who could prove themselves to be either first or second cousins, or the representatives of first and second cousins, Sir *John Leach* was of

(1) 9 Sim. 386.
(2) 19 Ch. D. 201.
(3) 4 My. & Cr. 56.
(4) 12 Ch. D. 639.
(5) 18 Ch. D. 218.
(6) Ibid. 634.
(7) 2 Bro. C. C. 125.
(8) 1 S. & S. 301.

opinion that all persons within the degree of relationship mentioned in the will were within the intention of the testator, and that therefore first cousins twice removed were entitled. In *Charge* v. *Goodyer* (1) that case was followed.

In *Sanderson* v. *Bayley* (2) it was decided that the words first cousins or cousins german were to be read strictly, and did not include the descendants of first cousins, and the preceding cases were distinguished, because in them the gift was to the testator's "first and second cousins." In *Slade* v. *Fooks* (3) a bequest to second cousins or their issue, where the testatrix had no second cousins, was held to mean first cousins once removed, and the issue of those deceased. In *Caldecott* v. *Harrison* (4) the Vice-Chancellor of *England* said that the word "cousins" used *simpliciter* would include cousins of every description, but as used in the will before him it meant first cousins. In the case of *Corporation of Bridgnorth* v. *Collins* (5), where the gift was to second cousins, the same Vice-Chancellor said that those only who had either the same great-grandfather or the same great-grandmother were the second cousins, and that they only could take.

In *Stoddart* v. *Nelson* (6) it was held that a gift to cousins meant first cousins only. That case was followed in *Stevenson* v. *Abingdon* (7).

In *In re Parker* (8) those cases were much canvassed, and it was held that the term "second cousins" did not include children or grandchildren of first cousins where there were second cousins to take. In *In re Bonner* (9), where the testator gave property to his second cousins, and had none at the date of his will or at his death, it was held that first cousins once removed were entitled.

Those are the principal cases on the subject, and it appears from them that the construction of these words has not been uniform, but that the tendency of the later decisions has been to give them their strict meaning unless there be no person of the

(1) 3 Russ. 140.
(2) 4 My. & Cr. 56.
(3) 9 Sim. 386.
(4) Ibid. 457.
(5) 15 Sim. 541.
(6) 6 D. M. & G. 68.
(7) 31 Beav. 305.
(8) 15 Ch. D. 528; 17 Ch. D. 262.
(9) 19 Ch. D. 201.

KAY, J. 1885 WILKS v. BANNISTER.

class—a fact which it seems to have been assumed the testator would know.

But the will which I have to construe, after a gift of the residue to first and second cousins, continues thus: "Including my reputed cousin *Andrew Brown* and his children or reputed children." *Andrew Brown* would have been a first cousin of the testator if legitimate, and his children would have been first cousins once removed. The including in a class someone who does not belong to it does not ordinarily extend the class; but where the reason for so including a person is expressed, as it is here, by the word "reputed," there is some ground for supposing that the testator considered that he and his children would have been first and second cousins within the meaning of those words as used by him, if *Andrew Brown* had been legitimate.

But a further indication is given in the codicil, by which the testator gave £100 to each of his cousins, *Joseph Bannister* and *George Cole*, in addition to any sum to which they "may be entitled under my will." Now *Joseph Bannister* and *George Cole* were first cousins once removed, and as the gift by the will was only to such first and second cousins as should survive the testator's wife and sister, the words "may be entitled" probably referred to that contingency, and this affords a strong indication that the testator meant by the words "second cousins" his first cousins once removed; and that, I think, is the true meaning of the words as used in this will.

Another question is, what is the effect of the clause in the codicil which directed that if any of his first or second cousins should die "before the payment of any sum or share" thereby or by the will directed to be paid to him or her, it should go over?

The nearest authorities seem to me to be *Whiting* v. *Force* (1); *Re Dodgson's Trust* (2); *In re Arrowsmith's Trusts* (3); and *In re Wilkins* (4), in all of which words of gift over before division or receipt were construed to mean not before actual payment, but before the time of payment. In *In re Arrowsmith's Trusts* the gift was to such nephews and nieces as should be living at the

(1) 2 Beav. 571.
(2) 1 Drew. 440.
(3) 2 D. F. & J. 474.
(4) 18 Ch. D. 634.

death of the testator, with a gift over of the share of any who should die before receiving their respective shares. It was held to mean any who should die before the end of the year from the testator's death, which is allowed to executors for payment of debts and legacies, not before actual receipt at a later period. It was said in that case that the share given over must mean a share that had vested—that is, a share of one of the class who survived the testator.

The difference in this case is that the gift is not at the testator's death, but on the death of the survivor of two persons who, he contemplated, would be living after his own death; so that the time of payment was the death of such survivor, not a year later. If the gift over be read if any die before the time for payment; that would be, not a gift over of a vested share, but a gift to the children of any cousin of the share to which he would have been entitled if he had survived the time of payment. After a good deal of consideration I have come to the conclusion that that is the true construction. The children of *Andrew Brown* and the children of *Sarah Gale* must be treated as some of the first cousins once removed, who are within this provision.

Solicitors: *C. N. Longcroft*, agent for *Longcroft & Green, Havant; W. D. Dowding; Longcroft & Wade.*

T. F. M.

CHITTY, J.

1885

July 3, 10, 15.

McBEAN *v.* DEANE.

[1885 M. 1956.]

Benefice with Cure—Charge—13 *Eliz. c.* 20 [*Revised Ed. Statutes, vol. i., p.* 634]—*Union of Benefices Act*, 1860 (23 *&* 24 *Vict. c.* 142) [*Revised Ed. Statutes, vol. xiii., p.* 899]—*Compensation payable to retiring Incumbent.*

In pursuance of an Order in Council under the *Union of Benefices Act*, 1860, uniting two City benefices, certain annuities were granted to the retiring incumbent and his assigns out of the annual income of the united benefice, and made a first charge thereon during the joint lives of himself and the incumbent of the united benefice, so long as he should perform in person, or by substitute to be approved of by the bishop, the duties of curate of the united benefice under the style of vicar in charge, with a provision for the retiring incumbent after the death of the incumbent of the united benefice :—

Held, that such annuities were not a benefice with cure within 13 Eliz. c. 20, and accordingly could be validly mortgaged by the retired incumbent.

BY an Order in Council dated the 5th of May, 1873, and made in pursuance of the *Pluralities Amendment Act*, 1850 (13 & 14 Vict. c. 98), and the *Union of Benefices Act*, 1860 (23 & 24 Vict. c. 142), a scheme for uniting the benefices of *St. Helen, Bishopsgate*, and *St. Martin Outwich* into one benefice under the style of the united rectory of *St. Helen, Bishopsgate, with St. Martin Outwich*, was confirmed. By this scheme it was provided that if both of such benefices should be vacant when the scheme should be confirmed, the union should forthwith take effect; if the benefice of *St. Helen*, only, should be vacant, the union should also take effect if the incumbent of *St. Martin* should consent to become the incumbent of the united benefice. If when the scheme should be confirmed both of the benefices should be full, then the union should take effect upon the next vacancy of the benefice of *St. Helen* if the incumbent for the time being of *St. Martin* should consent to become the incumbent of the united benefice, but if he should not so consent, then the union should take effect immediately upon the first vacancy of the benefice of *St. Helen* which should happen after the avoidance of the benefice of *St. Martin*, and the then incumbent of *St. Martin* should be the first incumbent of the

united benefice. And in either case it should be lawful for the bishop to admit to the united benefice such first incumbent (if an incumbent for the time being of either of the existing benefices) without any form or fee of presentation, and he should thereupon become the incumbent of the united benefice. (2.) If (as happened) the then incumbent of *St. Helen* (Dr. *Cox*), should retire from his incumbency in order that the union might take immediate effect, and the then incumbent of *St. Martin* (the Rev. *J. B. Deane*) should be willing to become the first incumbent of the united benefice, such incumbent of the benefice of *St. Helen* should be entitled to receive out of the annual income of the united benefice, and by way of compensation, the yearly sum of £42 9*s.* 10*d.* (being a sum equal to the net annual value of the endowments annexed to his incumbency), and also the Easter offerings for that portion of the united benefice which should represent the present benefice of *St. Helen*, and also the further annual sum of £300, which annual sums were to commence as from the day on which the union should take effect and be payable quarterly. (3.) The £42 9*s.* 10*d.* and the Easter offerings to be payable to Dr. *Cox* during the joint lives of himself and Mr. *Deane*, and the £300 per annum to be payable to Dr. *Cox* so long during his life as he should be able and ready and willing to perform in person, or by a substitute to be approved of by the bishop, the duties of curate of the united benefice, and it was ordered that while he should so perform the duties of such curate he should be styled and called the vicar in charge of the united benefice, but the performance of such duties by the vicar in charge was not to affect the obligation of the incumbent of the united benefice to reside on the benefice, unless such residence should be duly dispensed with by license by the bishop. (4.) In the event of the incumbent of *St. Martin* vacating the united benefice during the life of Dr. *Cox*, the annual sums and Easter offerings should from the first quarter day after the vacancy cease to be payable, and from and after such quarter day the present incumbent of *St. Helen* should be entitled in lieu thereof to receive the annual sum of £400 during the remainder of his life, payable by equal half-yearly payments. It was also provided (5) that the said annual sums should be charged upon the annual income of the

CHITTY, J. 1885 McBEAN v. DEANE.

united benefice and be payable by the incumbent for the time being of the united benefice, and that as between that incumbent and the retiring incumbent and his assigns the said annual sums should be a first charge at law and in equity upon the income of the united benefice, the incumbent of which benefice should be deemed to have accepted the same, subject to a trust to pay to the retiring incumbent or his assigns the said annual sums out of the income of such benefice, and for that purpose should use all due diligence to receive and collect the income of the united benefice, and that if such annual sum should be in arrear, it should be lawful for the bishop to sequester the profits of the benefice in satisfaction of the arrears, but that the power so conferred upon the bishop should not in any wise abridge or interfere with the rights of the retiring incumbent or his assigns to recover such annual sums and all arrears thereof by proceedings at law or in equity.

By deed of the 22nd of May, 1873, Dr. *Cox* resigned his benefice of *St. Helen, Bishopsgate*, and thereupon under the provisions of the Order in Council the two benefices became united and consolidated into one benefice by the name of "*The United Rectory of St. Helen, Bishopsgate, with St. Martin Outwich.*" The Rev. *J. B. Deane* became the incumbent of the united benefice, and Dr. *Cox* thereby became entitled during the joint lives of himself and the Rev. *J. B. Deane* to receive out of the annual income of the united benefice the annual sums of £42 10*s.* and the £300 per annum, as provided by the Order in Council, and he had from that time received these annuities.

On the 24th of November, 1876, a deed of separation was executed by Dr. and Mrs. *Cox*, by which Dr. *Cox* covenanted with the trustees therein named for the payment of certain annuities for the benefit of his wife and the children of the marriage.

By deed of the 28th of April, 1880, Dr. *Cox* assigned to *J. N. Upfill* all the stipend, endowments, and emoluments to which he was entitled as vicar in charge of the united parishes of *St. Helen* with *St. Martin Outwich*, and also all further and other stipend, endowments, or emoluments (if any), to which he should thereafter become entitled as such vicar in charge as aforesaid, or as vicar, or any retiring emoluments which he might thereafter

become entitled to or possessed of—by way of mortgage to secure a sum of £436 9*s.* 11*d.* and interest owing to *Upfill*. On the 23rd of July, 1880, that security was assigned by *Upfill* to the Plaintiff, *A. H. McBean*.

On the 24th of January, 1885, the trustee of the separation deed recovered judgment against Dr. *Cox* for the sum of £227 17*s.* 6*d.* which was then owing under the separation deed, and execution was issued thereon. The trustee then applied for a sequestration of the profits of the living, and from doubts entertained by the Registrar, whether under the scheme Dr. *Cox* was a beneficed clergyman, the matter was referred to Dr. *Tristram*, the Chancellor of the diocese, who decided that the emoluments accruing to Dr. *Cox* were a benefice capable of being sequestered, and accordingly directed the writ to issue. It appeared, however, in the course of the present hearing that all incumbents of livings in the city of *London* are *ipso facto* fellows of *Sion College*, and that upon the making of the Order in Council a question had arisen whether Dr. *Cox* was still a fellow of the college, whereupon it was decided by the late Bishop of *London*, as visitor of the college, that a clergyman who retired under the *Union of Benefices Act*, 1860, by executing a deed of resignation, and ceasing thus to be the incumbent of the benefice, ceased also to be a fellow of the college.

On the 14th of May notice of his charge was given by *McBean* to the trustee of the separation deed. On the 10th of June he had issued a writ in an action against the Rev. *J. B. Deane* and *Craddock*, the incumbent and the churchwarden of the united parish, and against *Pitman*, the trustee of the separation deed, and Dr. *Cox*, claiming an injunction to restrain payment to the trustee of the next quarterly payment of the compensation money payable to Dr. *Cox*, the vicar in charge, and a declaration that the Plaintiff was entitled to receive the same and all future quarterly payments by virtue of his securities of the 28th of April and 23rd of July, 1880, until the debt due to him under such deeds was discharged.

He now moved for an injunction.

The question argued was whether the mortgage created by Dr. *Cox* in April, 1880, upon the stipend, endowments, and emoluments to which he was entitled as vicar in charge of the united

CHITTY, J. 1885 McBEAN v. DEANE.

parishes under the Order in Council, was a charge of a benefice with a cure of souls, and therefore void under 13 Eliz. c. 20.

Sir *Walter Phillimore*, Q.C., and *Leicester P. Beaufort*, for the Plaintiff, in support of the motion:—

Dr. *Cox* has formally resigned his benefice and ceased to be an incumbent, and the annual sums payable to him under the provisions of the Order in Council by way of compensation cannot be said to be a benefice within 13 Eliz. c. 20, which makes utterly void all chargings of any benefice with cure. Such compensation is an ordinary *chose in action* capable of assignment, and this is confirmed by the language of the Order in Council which uses throughout the words "the retiring incumbent and his assigns."

[CHITTY, J.:—In *Gathercole* v. *Smith* (1) it was held under the *Incumbents Resignation Act*, 1871, s. 10—which declares that the pension allowed to a retiring incumbent shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators or assigns, but shall not be transferable at law or in equity—that such pension, notwithstanding the use of the words "assigns," was incapable of alienation. So, also, in *Hawkins* v. *Gathercole* (2) it was held that the Act of *Elizabeth* had not been repealed by the general words contained in 1 & 2 Vict. c. 110, s. 13, and that a judgment against an incumbent did not create a charge upon his benefice.]

The Order in Council contains no prohibition against alienation. But, even if the annuities payable by way of compensation are a benefice, it is a benefice without cure of souls, and as such can be validly charged: *Grenfell* v. *Dean and Canons of Windsor* (3), where a mortgage of a canonry with its profits, there being no cure of souls, and the only duties residence and attendance in chapel for twenty-one days in the year, was held valid. So here there is no cure of souls, as Dr. *Cox* is not bound to discharge any ecclesiastical duties in person, but may perform them by substitute, for which the bishop's dispensation is not, as in the case

(1) 17 Ch. D. 1.
(2) 6 D. M. & G. 1.
(3) 2 Beav. 544.

of an incumbent, necessary. At most the duties are those of a stipendiary curate, whose stipend is not a benefice within 13 Eliz. c. 20, and may be validly assigned.

Romer, Q.C., and *Wedderburn*, for the sequestration creditor:—

We admit that the Easter offerings and the annuity of £42 10*s.* cannot be said to be a benefice, or part of a benefice, being given without duties being attached to the receipt of those amounts. But with respect to the annuity of £300 it is clearly a benefice, and the Plaintiff's charge being a charge upon a benefice is clearly void within 13 Eliz. c. 20, which, so far as it prohibits chargings of benefices, is still in force. The distinguishing characteristic of a benefice is that the incumbent holds it as a freehold for a definite period independently of the will of another, and from which he cannot be expelled or excluded: *Watson's* Clergyman's Law. It is plain that under the Order in Council neither the bishop nor the incumbent of the united benefice could expel Dr. *Cox*. A benefice is thus defined by *Duarenus* (*De Benef.* (1)): "*Res ecclesiastica quæ sacerdoti vel clerico ob sacrum ministerium utenda in perpetuum concedatur*," see *Stephens'* Laws relating to the Clergy (2), where *in perpetuum* is translated "annexed to the church for ever." Again, "*Beneficium*, or benefice, is a large word, and is taken for any ecclesiastical promotion or spiritual living whatsoever:" *Coke* (3); *Phillim.* Eccl. Law (4); *Wharton's* Law Lexicon. Dr. *Cox's* position is that of a perpetual curate rather than a stipendiary curate, and a perpetual curacy is a benefice within the meaning of the *Benefices Pluralities Act* (1 & 2 Vict. c. 106): *Cripps'* Law of Church and Clergy (5); and a mortgage of pew rents by the vicar of a district church is void as being a charge on the beneficial interest given to the vicar in charge for his maintenance: *Ex parte Arrowsmith* (6); *Coote* on Mortgages (7). So also ejectment will not lie for a canonry, which is an ecclesiastical office only: *Doe* v. *Musgrave* (8). The use of the term "assigns" in the Order is not inconsistent with our contention,

(1) Lib. 2, cap. 4, p. 1169.
(2) Page 140.
(3) 2nd Inst. p. 29.
(4) Pages 306–7.
(5) 5th Ed. p. 161.
(6) 8 Ch. D. 96.
(7) 5th Ed. pp. 374–5.
(8) 1 Man. & G. 625.

CHITTY, J. 1885 McBEAN v. DEANE.

as it may refer to an alienation of arrears of payment, or to payments to a substitute.

[They also cited *Alchin* v. *Hopkins* (1) and *Dean and Chapter of Norwich's Case* (2).]

Sir *W. Phillimore*, in reply:—

The *onus* is on the Defendants of shewing that Dr. *Cox* could not assign the sums payable to him by way of compensation under the Order in Council. We submit that such compensation is not "a benefice with cure of souls" within the meaning of 13 Eliz. c. 20. That statute, as shewn by the preamble, deals with "benefices and other ecclesiastical livings with cure," and unless the Defendants can shew that the Plaintiff's mortgage was a charging of a benefice with cure, the mortgage is not within the prohibition of the Act, and is valid. The compensation allowance is not a benefice, as—1st. A new benefice cannot be created by Order in Council, or by any private individual, or otherwise than by the express terms of a statute. 2nd. "Benefice" and "incumbent" are correlative terms, and the holder of a benefice can only be introduced in one of the three ways known to law: by presentation, institution, or induction.

With the exception of donatives, and perpetual curacies, which were "monks' vicarages;" the cure of souls remaining in the monks, and the minister, whom they employed, being a mere stipendiary: *Duke of Portland* v. *Bingham* (3), induction was the temporal act necessary in order to clothe the incumbent with the legal fee of the benefice whereby he is made complete incumbent of the living, "and it is the same in the Canon Law as livery and seisin at the Common Law:" *Ayliffe, Parergon* (4); after which it cannot be questioned in the Ecclesiastical Court: *Watson's* Clergyman's Law (5). If *Cox* is an incumbent, how did he get his incumbency? Upon the passing of the Order in Council he formally and canonically resigned his benefice, and *Deane* was formally admitted to the united benefice: in fact the Order in Council provides for his institution, but is silent as to

(1) 1 Bing. N. C. 99.
(2) 3 Rep. 73 a.
(3) 1 Hagg. Cons. 157, 165.
(4) Page 302.
(5) Page 7.

anything of the kind in the case of Dr. *Cox*. The whole scope of the *Union of Benefices Act*, 1860, is to get rid of the benefice of the retiring incumbent, for whom provision is to be made, and to create the united benefice. Then what can be said of a benefice which is to cease with the life of the first incumbent and is not attached to the church for ever. No benefice yet was ever held by one incumbent and made determinable with his life. The passage from *Duarenus*, the meaning of which is open to dispute, is thus referred to in *Ayliffe*, *Parergon* (1): "And it is said to be *in perpetuum*, because the clerk is to enjoy and receive the same for ever during life; or (as others say) because the thing is annexed to the church for ever." And see *Godolphin's Repertorium* (2), from which *Stephens* has taken his translation without acknowledgment. All that Dr. *Cox* is entitled to under the Order in Council is compensation in the shape of money charged upon the united benefice, but that compensation is in no sense a benefice with cure, and may validly be charged.

[*Colt* v. *Bishop of Lichfield* (3); *Willcock* v. *Terrell* (4); *Phillim.* Eccl. Law (5), were also referred to.]

J. Simmonds, for Rev. *J. B. Deane*.

A. Whitaker, for *Craddock*, one of the two churchwardens of the united benefice.

CHITTY, J.:—

The question in this case is whether the provisions made for Dr. *Cox* by the Order in Council of May, 1873, are assignable or not. It was suggested in argument that the case falls within the *Incumbents Resignation Act*, 1871 (34 & 35 Vict. c. 44). Plainly it does not. The resignation of Dr. *Cox* took place, not under that Act, but under the Order in Council. The question turns on the Act 13 Eliz. c. 20, sect. 9 of 23 & 24 Vict. c. 142 (the Act which relates to the union of benefices), and the Order in Council. In the argument on behalf of the Defendant any argument founded on general public policy was expressly disclaimed. Are,

(1) Page 112.
(2) Page 200.
(3) Hob. 140, 150.
(4) 3 Ex. D. 323.
(5) Pages 1722, 1723.

CHITTY, J. 1885 McBEAN v. DEANE.

then, the provisions which were made for Dr. *Cox* by the Order in Council a benefice with cure of souls within the statute of 13 Eliz. c. 20? These provisions are: 1. The annual sum of £42 9*s.* 10*d.*; 2. The Easter offerings; 3. The annual sum of £300; and 4. The annual sum of £400; and of these four the first three only are now in question. Plainly in no view of the case are the £42 9*s.* 10*d.* and the Easter offerings a benefice or part of a benefice with cure. No spiritual duties are attached to them. The substantial question then is as to the £300 per annum. The word "benefice" occurs in *Magna Charta*, which provides that "No man of the Church shall be amerced after the quantity of his spiritual benefice, but after his lay, and after the quantity of his offence." Upon this passage Lord *Coke* observed (1): "*Beneficium* is a large word, and is taken for any ecclesiastical promotion or spiritual living whatsoever." The term as used in the statute 13 Eliz. c. 20, is plainly used in a large sense, as appears by the context, and the title of the Act is "An Act touching benefices and other ecclesiastical livings with cure." The recital is that the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses. The first enacting part, which relates to leases, speaks of any benefice or ecclesiastical promotion with cure or any part thereof, and that part of the statute which is more directly in question before me enacts that all charges on such benefice with cure, or with any pension or any profit out of the same other than certain rents, which I need not mention, shall be utterly void. The word benefice must therefore in that Act include ecclesiastical livings—livings appointed for ecclesiastical ministers and ecclesiastical promotion.

The material section of 23 & 24 Vict. c. 142, is sect. 9, which authorizes the insertion of any provisions which may be necessary for the compensation of any of the incumbents of the benefices to be united, who may be willing to retire therefrom. The Act does not authorize the creation of any new benefice except the benefice to be created by the union of the two parishes into one benefice. The Order in Council does not purport to create any new benefice except the benefice to be created by the union of the

(1) 2 Inst. p. 29.

two parishes of *St. Martin Outwich* and *St. Helen*, and of this united benefice Dr. *Deane* became the incumbent.

Of the four provisions made for Dr. *Cox*, who was the incumbent of *St. Helen's*, and who retired under the scheme, three are wholly unconnected with any cure of souls, and are granted in express terms by way of compensation (sect. 3); the fourth, viz., the £400 per annum, is plainly also given by way of compensation (sect. 4). Dr. *Deane* was, in compliance with the terms of the scheme, admitted by the bishop, and duly instituted to the united parishes. Institution is the investiture of the spiritual part of a benefice: by institution the care of the souls is committed to the clerk. No such institution was required in the case of Dr. *Cox*. He was neither presented, nor instituted, nor inducted. Some spiritual duties are undoubtedly annexed to the right to receive the £300 per annum.

The material part of sect. 3 limits that annual sum to so long as he shall be able, ready, and willing to perform in person, or by a substitute to be approved by the bishop, the duties of curate of the united benefice. And it provides that while he shall so perform the duties of such curate, he shall be styled the vicar in charge of the united benefice; but the performance of such duties by the vicar in charge is not to affect the obligation of the incumbent of the united benefice to reside on the benefice. This therefore is a conditional limitation, and the right to receive £300 per annum is so long, and so long only, as Dr. *Cox* performs these duties. Dr. *Cox* is not under any obligation to perform the duties in person. He may perform them by substitute. The substitute must be approved by the bishop. Dr. *Cox* has the right to appoint a substitute if he thinks fit. The bishop could not refuse arbitrarily to exercise his right of approval. He could not say: "I consider that you ought to perform these duties yourself, and I decline to approve of any substitute, however competent he may be."

On the non-performance of the duties by Dr. *Cox* personally or by substitute the annuity of £300 ceases. Dr. *Cox* could not be required to resign. He has nothing to resign. It is entirely optional with him to perform the duties or not. If he does not perform the duties the annuity of £300 ceases. The Order thus

CHITTY, J.
1885
McBEAN
v.
DEANE.

contains in itself a special remedy for the mischief against which the statute of 13 Eliz. c. 20, was directed. From the foregoing observations it appears that the position of Dr. *Cox* is anomalous, and that it differs in several material respects from that of an incumbent of a benefice with cure. As to two of the points of difference, it is scarcely necessary to point out that such an incumbent requires institution, and that he has no power of his own free will to divest himself of his spiritual duties or cure of souls. His resignation is not effective unless accepted by the bishop.

Sect. 9 of 23 & 24 Vict. c. 142, does not prohibit the assignment of the compensation which it authorizes. The *Incumbents Resignation Act*, 1871 (34 & 35 Vict. c. 44) contains an express provision, rendering inalienable the pension granted under that Act. It was considered by the Legislature necessary to insert some such special prohibition. That observation is not conclusive, but it is not immaterial on the question before me. The Order in Council not only does not in terms prohibit assignment, but on the contrary treats the provisions as assignable.

Sect. 5 of the Order relates to all of the three annuities without distinction. The term "assigns" occurs throughout in connection with the clerk who retires. The term is studiously omitted in reference to the incumbent of the united parishes. The provisions are made payable to the retiring clerk and his assigns, and the retiring clerk and his assigns are empowered to sue at law or in equity for all the annuities without distinction. A special remedy is given through the bishop, but it is declared that this remedy shall not prejudice the ordinary civil remedies at law or in equity of the retiring clerk or his assigns. The incumbent of the united benefice is constituted a trustee for the retiring clerk and his assigns to the extent of the annuities, to enforce the charge and the due performance of the trust. The retiring clerk and his assigns would be entitled in a proper case to the ordinary equitable remedy of a receiver, a remedy which is not granted in the case of a benefice with cure of souls. In *Gathercole* v. *Smith* (1), the Court had to reconcile the meaning of the word "assigns" with the express declaration rendering the provision

(1) 17 Ch. D. 1.

inalienable, and was compelled to give a somewhat narrow and restricted meaning to the word "assigns." No such difficulty occurs in the case before me.

For these reasons I hold that Dr. *Cox* has not a benefice with cure within the statute of *Elizabeth*, and further, that sect. 9 of 23 & 24 Vict. c. 142, authorizes the granting of an alienable provision by way of compensation to him on his retirement, and that the Order in Council has granted all the provisions without distinction in such terms as to make them alienable.

Solicitors: *A. R. Oldman*, agent for *J. M. Upfill, Croydon; E. & F. Bannister; Bridger & Co.; Combs, Bayly & Henley.*

F. G. A. W.

CARDIGAN *v.* CURZON-HOWE.

[1869 C. 30.]

Settled Land Act, 1882—*Tenant for Life—Sale—Pendency of Administration Action.*

The pendency of an action by tenant for life in which a decree has been made for execution of the trusts of a settlement, does not prevent him from exercising his power of sale under the *Settled Land Act*, 1882, without the sanction of the Court.

ADJOURNED SUMMONS on behalf of a purchaser from the tenant for life (the Countess of *Cardigan*) of a portion of the real estates settled by the will of the late Earl of *Cardigan*, that the applicant might be at liberty to pay into Court to the credit of *Lady Cardigan* v. *Curzon-Howe* (1869 C. 30) "Real Estate Account," the purchase-money (£452 12*s.*) payable by the applicant under the agreement for sale.

By his will, dated the 24th of May, 1865, the late Earl of *Cardigan* devised and bequeathed his real and personal estates unto and to the use of trustees upon trust to permit the Countess during her life to inhabit and enjoy for her own use and benefit the mansion-house at *Deene*, with the gardens and park, and the pictures, plate, deer, and other articles in and about the mansion-house and park, and during the lifetime of the Countess to manage and let all other the said manors, messuages, farms, lands,

CHITTY, J. 1885 CARDIGAN v. CURZON-HOWE.

hereditaments, estates, and premises (except the said mansion-house, park, farms, and lands, with the pictures, books, plate, furniture, articles and things there which might be held or occupied by his wife) and collect and receive the rents, issues, and profits thereof; and upon trust after her death to manage and let the whole of the said manors, &c., and collect and receive the rents, and pay, apply, and dispose of the same as thereafter mentioned. Power was given to the trustees to raise by mortgage of all or any of the testator's estates in the counties of *Northampton*, *Leicester*, and *York* (except the mansion-house and park and any farm and lands which might be occupied by his wife) such sums of money as should in their opinion be sufficient for payment of debts, funeral and household expenses, and legacies given by the will. In case the trustees, or the survivors or survivor of them, or the heirs or assigns of each survivor, should not within six months after the testator's death be able to obtain a satisfactory mortgage for the money required for the purposes aforesaid the testator empowered them or him to sell and dispose of so much and such part and parts of his estates in the counties of *Northampton*, *Leicester*, and *York* (except the mansion-house, &c.), as they might deem requisite for payment of his debts and funeral and testamentary expenses and legacies, and all costs, charges, and expenses attending the sale or sales of such last mentioned estates, and to apply the moneys so to be raised by such sale or sales in payment of testator's debts (other than mortgage debts), funeral and testamentary expenses, legacies duty, and costs as aforesaid. And for the purpose of effectuating such sale or sales testator thereby authorized and empowered his trustees to convey and assure all or any parts of his estates in the counties of *Northampton*, *Leicester*, and *York* in such manner as they should deem necessary and expedient.

The trusts of the rents were: (1) to pay all costs, charges, and expenses of and attending the receipt thereof or incurred in the management or letting of the estates and all other outgoings; (2) to keep down the interest on mortgages of the same premises; and, (3) to pay all the surplus of the said rents, issues, and profits, which should from time to time remain after making such payments, unto his wife for her own use during her life.

From and after the death of the testator's wife the surplus rents were to be accumulated for the purpose of paying off mortgages on the real estates; and upon the expiration or other determination of the period of accumulation, but subject and without prejudice to the trusts therebefore declared for her benefit for her life, the trustees were directed to convey and assure the real estates in the several counties of *Northampton*, *Leicester*, and *York*, or any of them, so that the same should stand limited, settled, and assured to certain uses (not material to be stated) with an ultimate remainder to the use of the testator's right heirs for ever. The testator also empowered the trustees during the life of his wife, with her consent in writing, and after her death at their discretion, to grant leases for any term or terms of years absolute not exceeding twenty-two years, to take effect in possession and not in reversion.

The testator died in March, 1868.

In 1869 the testator's widow filed a bill (*Cardigan* v. *Curzon-Howe*, 1869 C. 30) for execution of the trusts of the testator's will, and by the decree made on the 30th of January, 1869, the trusts of the will and codicils were ordered to be performed and carried out, and accounts and inquiries (including an inquiry whether any part of the testator's real estate consisted of lands adapted for building purposes and whether any contracts made by the testator during his life for letting such lands for building purposes remained to be performed) were directed.

By the order on further consideration, of the 19th of January, 1874, the Defendants, the trustees, were ordered to carry into effect, under the direction of the Judge in Chambers, the several contracts by the Chief Clerk's certificate certified to have been entered into by the testator during his life for selling or letting portions of his real estates for building purposes, or such of them as still remained to be performed; and it was also ordered that the trustees be at liberty to carry into effect under the like direction the verbal arrangement or agreement certified to have been entered into by the agents of the testator for conveyance of a piece of land at a perpetual rent-charge. Further consideration was again adjourned, but the case had not yet been heard on second further consideration.

CHITTY, J.
1885
CARDIGAN
v.
CURZON-HOWE.

After the passing of the *Settled Land Act*, 1882, Lady *Cardigan*, in April last, as tenant for life under the Act, had entered into a contract for the sale for £450 of a small portion of the settled estate.

A summons having been taken out by the purchaser for payment of the purchase-money into Court, the Chief Clerk declined to make any order on the ground that there was no evidence of value, or as to the propriety of the sale; and that the Plaintiff was endeavouring to ignore her own suit for the purposes of sale, and at the same time to obtain the benefit of the decree by having the purchase-money paid into Court in the suit.

Ingle Joyce, for the purchaser.

Romer, Q.C., and *Nalder* for the tenant in tail in remainder:—

Lady *Cardigan* as tenant for life cannot effect a sale without the sanction of the Court pending the suit for the administration of Lord *Cardigan's* estate and the execution of the trusts of his will. As tenant for life under the *Settled Land Act* she is not in any better position than a trustee under a will with absolute discretion as to a sale, who would not, after a decree for administration, be entitled to exercise his power without the sanction of the Court. After a suit has been instituted for execution of the trust and a decree made, trustees under a will with an absolute discretion as to a sale are not entitled to exercise their power without such sanction: *Walker* v. *Smalwood* (1); *Lewin* on Trusts (2). Is then, the tenant for life under the *Settled Land Act* in any better position? We say not, especially as in this case Lady *Cardigan*, who has obtained a decree for the execution of the trusts, claims the right to sell irrespective of the decree, so as not to be bound thereby, and at the same time seeks to avail herself of the decree by having the purchase-money paid into Court under it. Moreover, by sect. 53 the tenant for life in exercising his powers is bound to have regard to the interests of all parties entitled under the settlement, and is in effect constituted a trustee for them, and in this case there is no evidence that the sale is proper and for the benefit of the parties interested under the settlement.

(1) Amb. 676.

(2) 7th Ed. pp. 388, 408, 516.

Ince, Q.C., and *C. T. Simpson*, for the tenant for life :—

The effect of the *Settled Land Act* is to give Lady *Cardigan* an absolutely unrestricted power to sell the estates of which she is only tenant for life, and the Court has no jurisdiction to interfere with or control the exercise of that power at the instance either of the trustees or of the persons interested in remainder: *Thomas* v. *Williams* (1); *Wheelwright* v. *Walker* (2). There is no such rule as that whenever an administration decree has been made the tenant for life is paralyzed from exercising the power of sale conferred on him either by the will or the *Settled Land Act*: *In re Mansel* (3).

Stallard, for the trustees of the will.

Northmore Lawrence, for an incumbrancer on Lady *Cardigan's* life interest.

CHITTY, J.:—

This is a question of some importance upon the *Settled Land Act*, 1882. Before the Act came into operation Lady *Cardigan*, who is a tenant for life within the Act (sect. 58, sub-sect. 1, cl. ix.), had applied for and obtained a decree in the usual form, for execution of the trusts of the will of the testator and codicil thereto. The action has been heard on further consideration, but some matters still required that there should be an adjournment of a second further consideration, and the cause has not yet been heard on the subsequent further consideration. Lady *Cardigan*, who, as I have said, is tenant for life by virtue of sect. 58, sub-sect. 1, cl. ix., is not entitled to the legal estate herself, but the legal estate is in the hands of the trustees. Consequently one of the trusts that the Court directed to be performed was the trust which affected her right as tenant for life; that is to say, there were powers in trust for management and repair, and the like, which preceded the trust for her, and she, in effect, by the will of the late Lord *Cardigan* and his codicil, was made tenant for life of the surplus remaining after the due execution of the trusts for

(1) 24 Ch. D. 558. (2) 23 Ch. D. 752.
(3) 33 W. R. 727.

CHITTY, J. 1885 CARDIGAN v. CURZON-HOWE.

management, repairs, and the like. That was clearly one of the trusts, as I have said, which was in the scope of the decree. Now after the decree was made and the suit had been proceeded with up to a certain point, the *Settled Land Act* having passed, Lady *Cardigan* wanted to exercise the powers which she undoubtedly had under the Act to sell a portion of the estate, and she has not asked the sanction of the Court before proceeding to sell; and the present application is that the money may be paid into Court either in the usual way under the *Settled Land Act*, or to a proper account in the suit.

It is said on behalf of the remaindermen that if the money is to come into Court at all, they prefer it should come into Court in the suit, and that seems obviously the most convenient course for the parties, because there are some special trusts in this will with regard to timber moneys and the like, involving the application of the timber moneys not only for repairs properly so called, but for something that is more than repairs, in the nature of improvements; and there are also questions which arise between Lady *Cardigan* and her remaindermen, with reference to the application of any moneys that may come in. The questions as to how much should go for improvements under the Act are questions of what are improvements under the Act. It would be very inconvenient to have the questions with regard to the application of money—*i.e.*, capital money—under the *Settled Land Act* dissevered from the consideration of those questions which arise on the application of the trusts with regard to the timber money. But Mr. *Romer's* submission in that respect is, of course, simply made on the assumption that my judgment is against him on the main point, which is, whether the tenant for life is justified in selling without coming to the Court, in such a case as the present, for its previous sanction. Now the *Settled Land Act* is an Act "for facilitating sales, leases, and other dispositions of settled land, and for promoting improvements thereon," and it seems to me the general object of the Act, as deduced from its particular provisions, was to confer upon the present generation of landowners, using that term in a very wide sense, the means of alienation, which, by the ingenuity of conveyancers and in the process of time, they had become deprived of. In settlements of land, and

a large portion of land in the country is covered by settlements, there were powers of alienation undoubtedly conferred on trustees, but it was found in practice those powers were not sufficiently extensive, and that land was not dealt with with the freedom that the Legislature considered to be proper. Consequently, to my mind one of the very objects of the Act was to strike off the fetters against alienation which in process of time had become attached to land. The Act is so framed as to confer upon the tenant for life the widest powers of sale, not for the purpose of enabling the tenant for life to obtain the money, but for the purpose, as I read the Act, of enabling the present owner, the man in possession of the land, to make the land alienable, and to make it a more marketable commodity than it had previously been. Another point, which appears to be an important one, is that the power conferred on the tenant for life, and those who by sect. 58 are placed in a similar position, is a power overriding the settlement or the will—a power paramount to the will, a power which cannot be fettered and cannot be incumbered, cannot be lost and cannot be released. That appears to be a very important consideration with regard to the case before me. Sect. 3 gives the tenant for life the power to sell the land. Sect. 4 requires that the sale shall be made at the best price that can reasonably be obtained. Sect. 31 provides that the tenant for life may contract, and makes the tenant for life's contract binding on land and enforceable, not according to the strict view, for special purposes, as entertained by the Court of Chancery, but it renders it a contract which affects the land itself, and one which enures to the benefit of the successor, so that the successor can enforce it. Sects. 50–57 are important as shewing that no restriction can be placed upon the powers of the tenant for life—the power of sale and the other powers conferred upon him. According to sect. 50 a contract by a tenant for life not to exercise any of his powers under this Act is void. Sect. 51 contains a carefully framed enactment (sub-sect. 1) with reference to the power of the settlor to oust the tenant for life from the powers which are conferred upon him by the Act, and all prohibitions and limitations against the exercise of those powers are rendered void: and (sub-sect. 2) even the limitation of an estate to the tenant for life until he shall exercise the powers of

CHITTY, J. 1885 CARDIGAN v. CURZON-HOWE.

the estate is so treated as to discharge the estate from the limitation, and allow the tenant for life, notwithstanding it, to exercise the power. Sect. 52 also enacts that the exercise by a tenant for life of the powers shall not occasion a forfeiture, notwithstanding anything in the settlement. Passing by sect. 53, sect. 54 provides that a purchaser dealing in good faith with the tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Act. Sect. 56 provides that the provisions are cumulative, but in case of conflict between a settlement and the Act, the provisions of the Act shall prevail, and accordingly notwithstanding anything in the settlement, the consent of the tenant for life is required for the exercise by the trustees of the settlement of any power conferred by the settlement, exerciseable for any purpose provided by the Act. Sect. 58, to which I have already alluded, places the persons whose estates are commensurate in substance with their own lives, in the same position as a tenant for life.

Now it appears to me, as I have said, that the result of the Act is to give an overriding power to the tenant for life. It precludes the settlor from any attempt to limit or destroy the power. It precludes the tenant for life himself by any contract from impairing the powers conferred on him, and it seems to me it would be a strange thing that upon an Act so framed, considering the powers which are thus strictly guarded and preserved to the tenant for life, that the effect of this suit, and a decree therein obtained before this Act came into operation, should impose any restraint upon the tenant for life in the exercise of his powers.

This point occurred during the argument. There are many powers which have been annexed to an estate, such, for instance, as the power which is conferred by sect. 31 of the *Conveyancing Act*, 1881, upon trustees. It was argued that such a power being annexed to the estate would be a power or a trust within the decree, so that, in regard to the exercise not merely of the powers of trustees which are conferred by the will or settlement itself,

but by an Act of Parliament annexing them to the estate, the Court would have directed not merely the execution of the powers expressly given by the settlement or will, but also those which are annexed to the estate. Now as a general proposition I think that is true. The trustees of a will ought not to exercise this power of appointment of new trustees without the sanction of the Court. That, to my mind, is conformable with the course of decisions on this matter. But the case I have before me of the tenant for life is one where powers are so conferred as to override the will and override the settlement. I think that the analogy ceases, and that the principle which I should apply in the case of a power conferred upon a trustee, of the nature I have mentioned, does not apply to the case of such a power as this Act of Parliament conferred on the tenant for life. Cases have been suggested where parties have the paramount power, such, as for instance, a railway company's power to purchase and take land. I do not consider the case analogous to that, because the railway company is outside the suit, and is not bound by the suit. A railway company has exercised and is entitled to exercise its power of taking the land notwithstanding that there happens to be a decree. I do not proceed on that analogy, or on the analogy of the mortgagee. The mortgagee can sell standing outside the suit. That, again, is a sale by a person who is not bound by the suit, and whose title is paramount to that of every person in the suit itself. The analogy, again, does not appear to me to apply to the case. I proceed really on the broader ground that if I were to say that the sanction of the Court was required to a sale by the tenant for life in the present case, I should be placing a fetter upon that which, to my mind, the Legislature intended should be free, and that is the real ground of my decision.

I ought to add one word on sect. 53. The meaning of that section is that the tenant for life is, as the section states, to have regard to the interests of other persons, and he is to be deemed to be a trustee in the exercise of the powers for those persons. He is not to exercise this power simply for his own benefit. At the same time, I have always acted, and until I am better instructed shall act, on this view of sect. 53. I consider that the tenant for life has the absolute right to sell, though, it may be

CHITTY, J. 1885 CARDIGAN v. CURZON-HOWE.

suggested, he is selling out of ill will or caprice, or because he does not like the remainderman, because he desires to be relieved from the trouble of attending to the management of land, or from any other such object, or with any such motive. The object of the section is best seen by reading it in connection with sect. 54, and the result is that the tenant for life must pursue his powers according to the Act. He must sell for the best price, and if he does not, and there is any corrupt or underhand bargain between him and the purchaser, then neither is his sale good, nor does the purchaser obtain a good title. But if the matter of sale is carried forward in good faith, and the purchaser deals in good faith with the tenant for life, then his contract of sale and conveyance stand. Sect. 53 does not, to my mind, make the tenant for life trustee of his power within the scope of the declaration contained in the decree made before this Act came into operation, for the execution of the trusts under the settlement. I am not called upon to say what the effect of a decree subsequent to the Act would be, but I intimate my opinion—it is mere *dictum*—that I should still have taken the same view of the case if the judgment had been made subsequently.

MINUTE OF ORDER:—The Court being of opinion that the tenant for life can sell under the *Settled Land Act*, 1882, without obtaining the leave or sanction of the Court in the administration action, Let the fund be paid into Court to the credit of the action. Purchaser to deduct her costs of the summons out of the fund before paying it in. Costs of other parties to be costs in the action. Money to be invested in Consols, and income paid to tenant for life. On payment of the money into Court, the receiver to deliver up possession to her of the purchased property.

Solicitors: *A. R. & H. Steele; Bloxams & Ellison*, agents for *John Bryan, Gloucester; Duncan, Warren, & Gardner.*

F. G. A. W.

In re BETHLEHEM AND BRIDEWELL HOSPITALS.

CHITTY, J.

1885

Aug. 8.

Practice—Payment out—Permanent Investment—Settled Land Act, 1882, s. 25 (*iv.*)—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2, *sub-r.* 7.

In applications for payment out of Court and investment under the *Settled Land Act*, 1882, of funds in Court representing the purchase-money of lands taken under the provisions of the *Lands Clauses Act*, 1845, the Court has a discretion under the Rules of Supreme Court, 1883, Order LXX., rule 1, and, where an application by petition is cheaper and more expeditious than by summons, will not disallow the costs of a petition, although the proceeding falls within the Rules of Supreme Court, 1883, Order LV., r. 2, sub-r. 7, as business to be transacted in Chambers.

In such cases, however, the option of proceeding by petition or summons is at the applicant's risk.

THESE were petitions for payment out and investment under the *Settled Land Act*, 1882, sect. 25 (iv.), of sums exceeding £3000, forming part of a fund in Court representing the purchase-money of lands belonging to the petitioners, which had been taken by the *Metropolitan Board of Works* under the *Metropolis Improvements Act*, 1863, which incorporates the provisions of the *Lands Clauses Act*, 1845.

The proposed investment was in the construction of sea-walls on the estates of the hospitals between *Margate* and *Westgate-on-Sea*, for the purpose of improving the land for building purposes; such improvements being improvements with capital trust-money authorized by the *Settled Land Act*, 1882, sect. 25 (iv.):—"Embanking or winning from a river or lake, or from the sea, or a tidal water."

Smart, and *Yate Lee*, for the Petitioners:—

This money in Court may be invested or applied as capital money arising under the *Settled Land Act*, sect. 32: *In re Byron's Charity* (1). No extra costs have been incurred by the application having been made by petition instead of by summons under the Rules of Supreme Court, 1883, Order LV., rule 2, sub-r. 7, and in a similar case the order was made and the costs of a petition were allowed: *Ex parte Jesus College, Cambridge* (2).

(1) 23 Ch. D. 171.

(2) W. N. 1884, p. 37.

CHITTY, J.
1885
In re BETHLEHEM AND BRIDEWELL HOSPITALS.

Geare, for the *Metropolitan Board of Works*, submitted that this being an application for permanent investment under the *Lands Clauses Act*, 1845, and therefore directly within Order LV. rule 2, sub-r. 7, it should have been made by summons, and that the Court had no jurisdiction to make the order on petition. He cited *Ex parte Maidstone and Ashford Railway Company* (1).

CHITTY, J.:—

I think I ought to allow the costs of these petitions. I wish to give the fullest and fairest interpretation to Order LV., and when I see that the cheaper and better course is to apply by summons I should at least not allow the costs incurred in presenting a petition. But there are cases in which it is really much cheaper to apply by petition, and in such a case not to make an order or to disallow the costs would be monstrous. Cases where a petition is preferable are not unusual. For instance, I had a case before me where it took nearly six months to get the order in Chambers, and I ascertained that the cost of that proceeding by summons far exceeded the costs that would have been incurred on petition. It was an application under the *Lands Clauses Act* for payment out to a person whose reversionary interest had accrued in possession. The tenant for life had lived for a long time, and many incidents had in the meantime occurred. It was a case of complicated title and involved most difficult investigations of pedigree and other matters before the title to the fund could be ascertained. The practice in my Chambers is in such cases to require a written statement, which is often as long as, and practically is, an imperfect petition. Very often neither counsel nor solicitors attend on the summons, but gentlemen come before me, subordinate clerks, who are not very competent to transact the business, and after a question or two as to the matters entrusted to them are found to be perfectly at sea, without rudder or compass. There are therefore some cases in which a petition would be rightly presented, and in my experience I have found cases where it would be far cheaper to proceed by petition. In *Ex parte Jesus College, Cambridge* (2), Mr. Justice *Kay* held that an application for an investment in

(1) 25 Ch. D. 168. (2) W. N. 1884, p. 37.

buildings was not in reality an application for an interim or permanent investment within the Rules of Supreme Court, Order LV., r. 2, sub-r. 7, and that in such a case as that a petition would be the right course. Here, however, the application is for the investment of capital money under the *Settled Land Act*, in improvements authorized by sect. 25 (iv.), and the investment is in fact of a permanent kind. That the Court has a discretion in a case like the present is well established. Rules of Supreme Court, 1883, Order LXX., rule 1, provide that non-compliance with any of the rules shall not render any proceedings void unless the Court or a Judge shall so direct, and goes on to confer in such cases upon the Court or Judge the most ample discretion. Looking at the cases before me I am of opinion that expense and trouble have often been avoided by presenting petitions. If these applications had been made in my Chambers I should have considered them proper cases for the attendance of counsel. I feel no difficulty in making orders on the petitions. The orders will be as prayed, with costs, according to the Act. I have to add that of course where it is possible to proceed either by petition or summons, and the application is made by petition, the applicant's choice of procedure rests with himself and at his own peril.

Solicitors: *W. F. Fearn; Still & Son; R. Ward.*

F. G. A. W.

CHITTY, J.

1885

July 30; *Aug.* 5, 12.

In re CHRISTMAS.
MARTIN *v.* LACON.

[1881 C. 2260.]

*Will—Mortmain—*9 *Geo.* 2, *c.* 36 [*Revised Ed. Statutes, vol. ii., p.* 403]—*Assignment of Harbour Duties—Interest in Land.*

A bond by Harbour Commissioners, in form prescribed by their Act, assigning the duties arising by virtue of the Act (which directed the application of such duties: 1st, in payment of the costs and expenses of obtaining the Act; 2, in payment of the interest of moneys advanced for defraying such expenses; 3, in payment of the interest of moneys borrowed under the Act; 4, in defraying working expenses; and, 5, in payment of principal moneys borrowed under the Act) is an interest in, or affecting land within 9 Geo. 2, c. 36, and therefore cannot be given by will for charitable purposes.

Knapp v. *Williams* (1) followed; *Attree* v. *Hawe* (2) and *In re Harris* (3) distinguished; *Jervis* v. *Lawrence* (4) not followed.

FURTHER CONSIDERATION.

The question was whether a bond for £400 granted under their Act by the *Great Yarmouth* Port and Haven Commissioners, of which the testator was possessed at the time of his death in February, 1881, was pure or impure personalty, and as such applicable or inapplicable for the charitable purposes expressed and declared in the testator's will of the 7th of May, 1880.

The *Great Yarmouth Port and Haven Act*, 1835 (5 & 6 Will. 4, c. xlix.), provided, sect. 4, that the property belonging to the Commissioners under the former repealed Acts, including the "*Haven House*" and all warehouses, workshops, and other buildings and erections, and the piers, jetties, and breakwaters, and other works, should be vested in the Commissioners for the time being for the purposes of the Act. Sect. 42 provided that it should be lawful for the Commissioners from time to time to demand, receive, and recover the several duties thereinafter specified, which were reckoned upon the tonnage of vessels entering or departing from the haven, and for loading and unloading goods. Power was also

(1) 4 Ves. 430, n.
(2) 9 Ch. D. 337.
(3) 15 Ch. D. 561.
(4) 22 Ch. D. 202.

given to the Commissioners to appoint collectors and receivers of the duties, with powers for enforcing payment of such duties.

Sect. 85 provided that it should be lawful for the Commissioners from time to time to borrow and take up at interest any sum or sums of money, not exceeding in the whole at any one time the sum of £20,000, upon the credit of the duties by the said Act granted; and the Commissioners were thereby empowered to mortgage, assign and charge all or any part of the said duties by the said Act granted (the costs and charges of assigning the same to be paid out of such duties), as a security for any such money to be borrowed as aforesaid, with interest, to or for the benefit of the party who should advance the same or his trustee; and all such mortgages, assignments, and charges should be according to the form therein set forth (or with such variations therein as the circumstances of the case might render necessary), by which the Commissioners under their hands and seals, in consideration of the sum of £—— advanced and lent by *A. B.*, assigned unto the said *A. B.*, his executors, administrators and assigns, "such proportion of the duties arising by virtue of the said Act, as the said sum of £—— doth or shall bear to the whole sum which hath, or shall have been, or may at any time be borrowed or become due and owing, or be charged upon the credit of the said duties to hold unto the said *A. B.* until the said sum of £——, together with interest after the rate of —— per cent. per annum for the same shall be repaid and satisfied."

Sect. 97 provided that all the duties by the Act granted to the Commissioners, and all other sums of money which at the time of the passing of the Act should be in hand from the receipt of duties under the repealed Acts, and all other sums of money to be received from time to time by the Commissioners for executing the Act under the authority of the said Act, should be vested in the said Commissioners, and should be applied by them and disposed of—1, in paying all the costs, charges, and expenses incurred in applying for, preparing, and obtaining the Act, and otherwise incident or relating thereto; 2, in paying the interest of any money which should have been advanced for defraying such costs, charges, and expenses; 3, in paying the interest of any money borrowed and then due under the repealed Acts, or which might

CHITTY, J. 1885 *In re* CHRISTMAS. MARTIN *v.* LACON.

be borrowed under the authority of the Act as and when the same should become due; 4, in defraying the expenses attending the execution of the several works, matters, and things by the said Act authorized, and in paying the moneys thereby made payable to the city of *Norwich* and the counties of *Norfolk* and *Suffolk* respectively as aforesaid; and, 5, in paying and discharging any principal or other moneys and demands borrowed, incurred, and then due under the authority of the repealed Acts, or which might be borrowed under the authority or on the credit of this Act.

W. Baker, for the Plaintiffs, the next of kin:—

The bond of the *Great Yarmouth* Port and Haven Commissioners acting under 5 & 6 Will. 4, c. xlix., is, on the authorities, an interest in land within 9 Geo. 2, c. 36.

Shares in the *Avon Navigation* under an Act of 10 Ann. are real estate, and as such were held to be subject to dower: *Buckeridge* v. *Ingram* (1). *Knapp* v. *Williams* (2) (which has never been overruled and on which we mainly rely) decides that turnpike tolls are an interest in land within 9 Geo. 2, c. 36. This was followed in *Ion* v. *Ashton* (3) (charges upon the rates and duties of a navigation company), and also in *Alexander* v. *Brame* (4) (debentures of Dock Commissioners, in form assigning "the duties arising by virtue of the Act"). Mortgages of turnpike tolls have been held to be real securities within an exception of "mortgages on real and leasehold security": *Cavendish* v. *Cavendish* (5) following *Robinson* v. *Robinson* (6) which decides that turnpike road bonds are real securities, being securities on tolls and toll-houses, *i.e.*, on certain corporeal and certain incorporeal hereditaments, "the remedy of the mortgagee or bondholder is merely against the real property made subject to the charge," with "no personal right against anyone" (7). The cases which will be relied on against this contention (of which *Attree* v. *Hawe* (8) is the principal) are cases of debenture stock, which has been held not to give the

(1) 2 Ves. 652.
(2) 4 Ves. 430, n.
(3) 28 Beav. 379.
(4) 30 Ibid. 153.
(5) 24 Ch. D. 685; reversed on appeal, 30 Ch. D. 227.
(6) 1 D. M. & G. 247.
(7) Ibid. 262.
(8) 9 Ch. D. 337.

holder an interest in land, but merely a charge upon the net earnings of the undertaking. The bond is an assignment of an incorporeal hereditament, viz., the duties arising by virtue of the Act, which are to be applied in payment of our interest (sect. 97), and on failure to pay the interest we can obtain a receiver, which gives us an interest in the actual soil of the harbour.

S. B. L. Druce, for parties in the same interest, supported the Plaintiffs' contention, and relied on *Alexander* v. *Brame* (1).

Stirling, for the Crown:—

The bond granted by the Harbour Commissioners is simply an assignment of the duties arising by virtue of the Act, which are enumerated in sect. 42, and does not constitute any charge on land within 9 Geo. 2, c. 36. The earlier authorities relied on by the other side have been completely overruled, and it is now settled that in order to create any interest in land, the land must be affected directly: *Attree* v. *Hawe* (2); *In re Harris* (3); *Jervis* v. *Lawrence* (4).

Baker, in reply:—

There is an absolute assignment in terms of a proportionate part of the duties, and such duties are incorporeal hereditaments (5).

CHITTY, J. (after stating the material provisions of the Act 5 & 6 Will. 4, c. xlix., proceeded):—

The mortgagees are thus the direct assigns of these duties. The Act contains no provision in reference to the appointment of a receiver, but the ordinary law of this Court would be to appoint a receiver for the purpose of assisting the mortgagees in the collection of dues such as these are. Suppose the case, which is not probable, but is certainly possible, that there was but one mortgagee, it appears to me that he would have, under this Act of Parliament, a direct right to receive the duties himself, and although he would not have all the statutory powers of distress,

(1) 30 Beav. 153.
(2) 9 Ch. D. 337.
(3) 15 Ch. D. 561.
(4) 22 Ch. D. 202.
(5) 2 Bl. Com. 16 *et seq.*

CHITTY, J. 1885 *In re* CHRISTMAS. MARTIN *v.* LACON.

and the like, which are conferred particularly upon the officer of the Commissioners, the effect would be that the mortgagee himself (or the mortgagees, if they combined together and entered upon the receipt of the duties), would be able to take payment, but not so effectually as through the medium of the Commissioners' collector.

Now this case appears to me not distinguishable upon any solid ground from the decision in the case of *Knapp* v. *Williams* (1), decided so long ago as 1798. There there was a mortgage of turnpike tolls; the security taken was upon the tolls simply, and did not include the toll-houses and gates. The Lord Chancellor (*Loughborough*) held that such a security as this fell within the provisions of 9 Geo. 2, c. 36, and in giving judgment said that the mortgagee would have a right to come to this Court to have an account and a receiver appointed, and he would have a right, by the aid of this Court, to have the tolls specifically applied to his mortgage. Then he goes on thus: "Consider what the point of law is, from the nature of the interest. It is not at all within the mischief: but the consequences would open a much larger field for charitable donations." No doubt part of these observations have been disposed of by *Philpott* v. *St. George's Hospital* (2), where their Lordships who addressed the House shewed that a statute of this kind ought not to be construed according to this tendency. The question was whether what had been done was substantially what had been prohibited? Then Lord *Loughborough* proceeds: "From the nature of the interest created by the Act, these tolls granted in perpetuity are certainly a hereditament." When he said that, he was referring to the language of 9 Geo. 2, c. 36, which prohibits a gift for charitable purposes of hereditaments or any estate or interest therein, or any incumbrance affecting any hereditaments. Then he proceeds to say that "it is in its nature an interest affecting land."

Now it is argued that in the case before me the duties were not a hereditament and, as I understand, part of the argument was founded upon this, that the duties are not granted to the Commissioners and their heirs; but that appears to me not a sound argument. These duties are a franchise in the hands of a subject,

(1) 4 Ves. 430, n. (2) 6 H. L. C. 338.

granted not by the Crown, but granted by an Act of Parliament. No distinction can be made, that I can see, between duties such as these, which are incidental to the haven and to the land which is covered by the water, and the security taken upon the turnpike road as in the case of *Knapp* v. *Williams* (1). It is not sufficient to take a case out of the Act merely that the subject-matter should in the hands of the grantees under the Act of Parliament not descend to their heirs. Here it does pass to their successors in perpetuity, and there are many things within the Act (9 Geo. 2, c. 36) which are not hereditaments in the testator himself, but where he has an interest of a personal nature in the hereditament. The simplest and most obvious illustration of that is the case of leaseholds, where the interest of the testator is an interest in a hereditament, but he has not in himself anything which will descend to his heirs. *Knapp* v. *Williams*, which was decided in 1798, has been repeatedly followed. In *Finch* v. *Squire* (2), which was a similar case, Sir *William Grant* said there was no valid distinction between money borrowed upon such a security as that which was before him (an assignment of poor rates and county rates) and money borrowed upon turnpike tolls. He said: "It is difficult to shew that a charity by taking money borrowed upon the latter security takes any interest in land." That was his own opinion, apparently. He goes on to say: "Those tolls are duties imposed by Act of Parliament upon passengers, in respect of their passage along the road. The right to collect those tolls gives no direct interest in the land itself, though an interest in the duties arising in consequence of a passage along or through the land." Whatever his opinion may have been, as shewn by these observations, he still, following *Knapp* v. *Williams*, held that the case fell within the statute.

In *Robinson* v. *Robinson* (decided in 1851) (3), the mortgage was upon tolls and toll-houses, but Lord *Cranworth* in giving his judgment says (4): "The security is merely a security on the tolls and toll-houses, *i.e.*, on certain corporeal and certain incorporeal hereditaments. They give no personal right against anyone. The remedy of the mortgagee or bondholder is merely against the

(1) 4 Ves. 430, n.
(2) 10 Ves. 41, 44.
(3) 1 D. M. & G. 247.
(4) Ibid. 262.

CHITTY, J. 1885 ~~ *In re* CHRISTMAS. MARTIN *v.* LACON.

real property, made subject to the charge;" and he there treats the tolls as incorporeal hereditaments, following in that respect the language of Lord *Loughborough* in *Knapp* v. *Williams* (1). In *Ion* v. *Ashton* (2) Sir *J. Romilly* decided that money charged upon the tolls of a harbour was within the statute, being satisfied that he could not hold that the charitable bequest of the charge upon the tolls was valid, without overruling *Knapp* v. *Williams*, and after referring to *Thornton* v. *Kempson* (before *Wood*, V.C.) (3), said: "I have myself followed *Knapp* v. *Williams*, and have known cases in which it has been followed without being brought into Court. It is not possible for me to overrule *Knapp* v. *Williams*."

In *Alexander* v. *Brame* (4) Sir *J. Romilly* held that the debentures of Commissioners of a dock made under Act of Parliament, and in the form of an assignment of the duties arising under the Act, were within the statute. No doubt he relied, to a considerable extent, on *Ashton* v. *Lord Langdale* (5), the authority of which, at least so far as some of the propositions are concerned, has been distinctly overruled in the Court of Appeal in a recent case of *Attree* v. *Hawe* (6). In giving his judgment he relied on *Ashton* v. *Lord Langdale*, and said (7): "Here is an undertaking in which their whole possession consists of real estate, and the right of levying tolls on vessels arises from the use of this as a highway, just in the same way as carriages make use of a road." That proposition is applicable to the case before me, and that was one of the grounds on which his decision proceeded.

In *Thornton* v. *Kempson* it was held that money secured by an assignment of rates on occupiers of houses under an improvement Act were within the statute. [His Lordship referred to pp. 599, 600: "When commissioners have the power of raising rates, I can only consider them to be like those corporate bodies who have the power of collecting rates, tolls, and dues; and if such a corporation mortgage the whole fund, they pass all their interest, including their right of raising it out of the land; and that was mainly the ground of the decision of the Lord Justice *Knight*

(1) 4 Ves. 430, n.
(2) 28 Beav. 382.
(3) Kay, 592.
(4) 30 Beav. 153.
(5) 4 De G. & Sm. 402.
(6) 9 Ch. D. 337.
(7) 30 Beav. 157.

Bruce, when Vice-Chancellor, in the case of *Ashton* v. *Lord Langdale* (1). Here the commissioners have a direct interest in the rates collected or to be collected, and it is an interest essentially affecting land. They have mortgaged a part only of them, but that makes no difference, for the mortgagee is at all events a tenant in common of the proportion included in the mortgage. With that proportion they have assigned the power of collecting the rates, and every one of the mortgagees is entitled not only to the money raised, or an action or suit against the mortgagors for not raising it, but also to have the powers of the commissioners for that purpose put in force, either by a mandamus at law, or a receiver in equity."] Now it appears to me that that is a body of authority supporting the proposition that the mortgages in question are within the statute, and that it is impossible for me even to consider the question of overruling those authorities. The only point that is open for me to consider is whether the principle laid down by the Court of Appeal in *Attree* v. *Hawe* (2) has in substance overruled *Knapp* v. *Williams* (3), and the authorities founded upon it. It appears to me that I cannot say that the principle enunciated in *Attree* v. *Hawe* has that effect. In that case the direct question was with reference to debenture stock, and the Court, holding that the debenture stock was not within 9 Geo. 2, c. 36, expressed an opinion that the rule would apply probably to debentures as well as to debenture stock. But when the judgments are examined it will be found that the Court considered, even with regard to the debentures, that though they were in form mortgages of the undertaking, and of the tolls and sums of money arising by virtue of the special Act, yet in substance the debentures, and certainly the debenture stock, were merely an assignment of the net earnings of the railway company remaining after payment of the working expenses of the railway, and that on the true construction of the Acts of Parliament the railway company had no power to part with their interest in the sums which they received, except subject to their retaining in hand a sufficient amount for the due performance of the statutory duties which were imposed upon them, and which duties were not

(1) 4 De G. & Sm. 402.
(2) 9 Ch. D. 337.
(3) 4 Ves. 430, n.

CHITTY, J. 1885 *In re* CHRISTMAS. MARTIN *v.* LACON.

alienated by them; following in principle the well known case of *Gardner* v. *London, Chatham, and Dover Railway Company* (1). In this case there is a direct assignment of tolls in form, and it is so to my mind in substance, because the first charge here is not the working expenses, but payment of the interest due to the mortgagees. The other case relied upon, not as overruling, but as impairing the authority of *Knapp* v. *Williams* (2) was the decision of the late Master of the Rolls in *In re Harris* (3). There the securities were given by justices, who had no power to mortgage the rates themselves, but merely had the power to call upon the guardians of the poor to raise the rates and pay over. The result, therefore, was that the security was simply the security of a pure money fund, and that was the principle upon which Sir *G. Jessel* decided the case. I think, therefore, in the circumstances that I am bound by *Knapp* v. *Williams* and the subsequent course of decisions, and that I must hold, as I do, that these mortgages are within the Act, and therefore the gift of them to charity is void.

Solicitors: *R. S. Fraser; Cattarns, Jehu, & Hughes,* agents for *Worship & Rising, Great Yarmouth; Hare & Co.,* for *Solicitor to Treasury.*

(1) Law Rep. 2 Ch. 201. (2) 4 Ves. 430, n.
(3) 15 Ch. D. 561.

F. G. A. W.

SHEPHERD *v.* CORPORATION OF NORWICH.

NORTH, J.

1885

June 15, 16, 17.

[1884 S. 291.]

Lands Clauses Act, 1845, *ss.* 18, 19, 23, 25, 27, 28, 30 [*Revised Ed. Statutes, vol. ix., pp.* 633-635]—*Notice to treat—Service on Occupier of Part of Premises—Notice adopted by Owner—Validity of Service—Reference to Arbitration—Arbitrator neglecting or refusing to act—Power of other Arbitrator to proceed ex parte.*

Where arbitrators have been appointed under sect. 25 of the *Lands Clauses Act*, 1845, and one arbitrator refuses or neglects for seven days to concur in the appointment of an umpire, the other arbitrator has power, under sect. 30 of the Act, to proceed *ex parte* to make an award, and the previous appointment of an umpire is not in such a case a condition precedent to the *ex parte* proceedings.

A corporation, three days before the expiration of their compulsory powers, without making any attempt to discover and serve the owner of the property, served a notice to treat on an occupier of part of the premises comprised in the notice to treat, who was the agent of the owner for the management of his property. The occupier took it the same day to the solicitor of the owner, and also wrote to the owner; but it did not appear that, as a matter of fact, the notice came to the hands of the owner before the three days had expired. The owner, however, after the expiration of the three days gave a counter notice under sect. 92 requiring the corporation to take the whole of his property. This notice he subsequently withdrew, and required the corporation to proceed with the purchase of the land specified in their notice to treat, which they declined to do:—

Held, that the service of the notice to treat was irregular and invalid, and that the owner could not, by his subsequent adoption of the notice, cure the irregularity and compel the corporation to proceed with it.

The conditions necessary for service of a notice to treat discussed.

IN January, 1883, the Plaintiff *Shepherd* purchased of one *John Lee Barber* certain leasehold premises situate in the city of *Norwich*, demised by a lease dated the 11th of October, 1840, for a term of sixty years from the date of the lease, at the yearly rent of £71 10*s*. The premises at the time of the purchase comprised several shops, an office, and a timber-yard. The Plaintiff paid the purchase-money at once, and thereupon received the title deeds, and was let into immediate receipt of the rents of the property; but the legal assignment of the lease to him by *John Lee Barber* was not executed until December, 1883.

NORTH, J.
1885
SHEPHERD
v.
CORPORATION
OF NORWICH.

The Defendants, the corporation of the city of *Norwich*, were authorized by their special Act (the *Norwich Improvement Act*, 1879), which incorporated the *Lands Clauses Act*, 1845, to make a certain new road; but by sect. 17 of their special Act their compulsory powers to purchase land expired on the 21st of July, 1883.

On the 18th of July, 1883, the Defendants left on the said premises of the Plaintiff a notice to treat, stating that they required to purchase the land and hereditaments specified in the schedule thereto. This notice was dated the 16th of July, 1883, and was addressed "to Mr. *James Russell Wellington*, and to all persons having or claiming any estate or interest in the said land and hereditaments." The land and hereditaments described in the schedule were part of the premises comprised in the lease of the 11th of October, 1840; and *James Russell Wellington* was at this time, as under-tenant of the Plaintiff, in occupation of a small portion of the premises affected by the notice to treat, the rest of the premises being let to other under-tenants.

From January, 1883, and until service of this notice to treat, *James Russell Wellington* had, under an arrangement with the Plaintiff, been acting as the agent of the Plaintiff in the management of the entire property. As such agent he let and dealt with it and collected the rents in his own name and as the ostensible owner—but duly accounting to the Plaintiff, who for certain reasons did not desire to appear as the real owner. The Defendants, at the time they served this notice to treat, were aware that the Plaintiff had some interest in the property, but they did not serve him with a notice to treat, nor did they make any attempt to do so. They, however, served a similar notice on *John Lee Barber* on the 18th of July, 1883, and he, on the 4th of August, 1883, gave them notice in writing that he was trustee only for the Plaintiff.

James Russell Wellington made no reply to the notice to treat that had been served upon him, but took it the same day to the Plaintiff's solicitor, Mr. *Prior*, who a day or two afterwards brought it to the knowledge of the Plaintiff. The Plaintiff thereupon, on the 30th of July, 1883, served the Defendants with a counter-notice under sect. 92 of the *Lands Clauses Act*, 1845, requiring

them to purchase the whole of his property. This counter-notice the Plaintiff withdrew on the 10th of April, 1884, and required the Defendants to proceed with their notice to treat; and on the 30th of April, 1884, the Plaintiff gave the Defendants notice claiming £3328 10s. as compensation for the land and hereditaments comprised in their notice to treat to *James Russell Wellington*, and desiring that the amount, if disputed, should be settled by arbitration in manner provided by the *Lands Clauses Act*, 1845.

On the 6th of June, 1884, the Plaintiff appointed a Mr. *Hunter* to act as his arbitrator in settling the amount of compensation, and the same day gave notice of the appointment to the Defendants.

On the 17th of June, 1884, the Defendants served on the Plaintiff a document, under the corporate seal, which, after reciting the Plaintiff's notice of appointment of his arbitrator, proceeded as follows: "Now the mayor, &c., do hereby assert and give you notice that you have no claim for compensation as aforesaid, and do protest against any such claim as invalid, and do further protest and deny the jurisdiction of your so-called arbitrator. And do further give you notice that they have (under protest) appointed Mr. *Henry Spelman* of the city of *Norwich*, auctioneer, to be arbitrator on their behalf in respect of the matters and alleged question in your aforesaid notice contained. And they, the said mayor, &c., further give you notice that they reserve all rights, remedies, and proceedings which they have, or are entitled to take, against you, and otherwise, in respect of your said notice and claim. And further, that they do in fact deny all liability in respect of your said notice and claim, and do further deny that any arbitration can be held in respect thereof."

On the same day they served *James Russell Wellington* with a document formally withdrawing the notice to treat they had served upon him on the 18th of July, 1883.

Immediately on the appointment of Mr. *Spelman*, Mr. *Hunter*, as the Plaintiff's arbitrator, requested him to act in the matter of the arbitration; but he, acting under instructions, did nothing, and on the 4th of July, 1884, the Plaintiff served him with a

NORTH, J.
1885
SHEPHERD
v.
CORPORATION
OF NORWICH.

written notice requiring him "to proceed in the matter of the said arbitration, and that, if you for seven days from receipt of this notice neglect to act, *William Hunter*, the arbitrator appointed on my behalf, will proceed *ex parte*, and that his decision will be as effectual as if he had been the single arbitrator appointed by me and the said mayor, &c."

In reply to this notice, Mr. *Spelman* stated that he had no instructions to act. Some negotiations then took place between the Plaintiff and the Defendants, which came to nothing, and on the 13th of August Mr. *Hunter* proceeded *ex parte* with the arbitration, and made an award. The Defendants declined to take up the award or to move at all in the matter, and thereupon the Plaintiff commenced this action claiming specific performance of the agreement between the Plaintiff and the Defendants for the purchase of the land and hereditaments comprised in the notice to treat; and, as additional or alternative relief, a mandamus to the Defendants to take the necessary steps for carrying out and completing the purchase of the said land and hereditaments comprised in the said notice to treat.

The Defendants, in their statement of defence, denied that they had at any time served a notice to treat on the Plaintiff, or agreed with him for the purchase of the hereditaments mentioned in the statement of claim; and further pleaded that the Plaintiff's arbitrator had no power to proceed *ex parte* in the arbitration, and that the arbitrator appointed by the Plaintiff, and the arbitrator appointed under protest by the Defendants did not, before entering upon the matter referred to them, appoint an umpire in accordance with sect. 27 of the *Lands Clauses Act*, 1845.

Issue was joined. This was the trial of the action. It was conceded that, if the point of law raised by the Defendants on sects. 27 and 28 of the *Lands Clauses Act*, 1845, was decided in their favour (assuming a valid notice to treat), it would dispose of the case. It was accordingly agreed that this point should be first argued.

Cozens-Hardy, Q.C., *W. W. Karslake*, Q.C., and *Sturges*, for the Plaintiff:—

We rely on the 30th section of the Act. The neglect or refusal

of *Spelman* for seven days to concur in the appointment of an umpire brought the 30th section into operation, and enabled *Hunter* to proceed *ex parte*, and to make a valid award.

W. Barber, Q.C., and *R. S. Wright*, for the Defendants :—

The question turns upon the construction to be placed on sects. 23 to 31 of the *Lands Clauses Act*, 1845, which are the sections that point out the procedure to be followed in ascertaining the amount of compensation by arbitration. Reading the sections together the intention of the Legislature is clear that, where two arbitrators have been appointed, they must appoint an umpire before they proceed to act. In other words, the appointment of an umpire is a condition precedent to their being qualified to act in the matter of the arbitration. There is no direct authority on the point, but the decisions in *Bright* v. *Durnell* (1), *Skerratt* v. *North Staffordshire Railway Company* (2), and *Cudliff* v. *Walters* (3), support this view. It follows that if one arbitrator disqualifies himself the other must apply under sect. 28 of the Act, as amended by 46 & 47 Vict. c. 15, to the Board of Trade to appoint an umpire. Unless he has done that he has no power to act at all, and the 30th section does not apply. The Plaintiff, therefore, is in default, he ought to have taken the next step, and is not entitled to a mandamus from this Court.

W. W. Karslake, in reply.

NORTH, J. :—

In this case I was asked to decide one point before dealing with the rest of the case, on the ground that, if it was decided in one way, it would render it unnecessary for me to hear the case further, and I consented to do that. The facts of the case, for the present purposes, are shortly these :—[His Lordship stated them, and continued :—] And for this purpose I assume that the notice to treat given to the Plaintiff's agent, *James Russell Wellington*, was in every respect a good notice to treat to the Plaintiff.

Now the preliminary point which I have been asked to decide

(1) 4 Dowl. 756.
(2) 2 Ph. 475.
(3) 2 Mood. & Rob. 232.

NORTH, J. 1885 SHEPHERD v. CORPORATION OF NORWICH.

is this. It is contended by the Defendants that the proceedings *ex parte* were invalid for this reason, that under the Act the appointment of an umpire is a *sine quâ non*, and that no steps can be taken by the parties until that has been done. The question whether that is so or not depends upon the construction of certain sections in the *Lands Clauses Act*. The first one that is material is the 25th section. That provides, reading the earlier part of it shortly, that when any question of disputed compensation requiring to be settled by arbitration has arisen, then, unless both parties concur in one arbitrator, each party shall appoint his arbitrator to whom the dispute shall go. It then goes on to point out the way in which the appointment of arbitrator is to be made, and the effect such an appointment will have. Then towards the end of the section we come to these words, "If for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final." If the suggestion of the Plaintiff, that *Spelman's* appointment was no appointment at all, had been sound the state of things contemplated by this section would have arisen. The Defendants would have failed to appoint an arbitrator, and the Plaintiff, having himself done so, might have proceeded to appoint *Hunter* to act on behalf of both parties, and then *Hunter* might have proceeded to hear and determine the matters in dispute, and in such case the award or determination of such single arbitrator would have been final. That is to say, if either party failed to appoint an arbitrator, the other might appoint his arbitrator to act for both, and his award made *ex parte* would be final. In that clause I see nothing whatever suggested in any way that it is necessary or desirable to appoint an umpire before the arbitrator proceeds to act alone, and there is nothing

whatever for which such an appointment could be required, because the umpire could not be wanted to do anything that was necessary. That case is not the present, for the reason that two arbitrators were appointed. It comes very near the existing state of things, because it practically makes no difference—I am not speaking of the provisions of the Act—as far as the position of the parties is concerned, whether one of the parties fails to appoint an arbitrator altogether; or, having appointed an arbitrator, says he shall not do anything from that time forward. The position of the parties is substantially, although not technically, the same, and there is no reason why, if an arbitrator can act *ex parte* without appointing an umpire in the one case, he could not equally do so in the other: though, if the Act draws a distinction and says there shall be an umpire appointed as a condition precedent in the one case and not in the other, it must be followed. It is clear that the Plaintiff did not proceed under this section, because it is not suggested, that having appointed *Hunter*, he ever did appoint him to act as arbitrator for both parties.

The next section, the 26th, provides that, if before the matters referred are determined, any arbitrator shall die or become incapable then the other arbitrator may proceed *ex parte*. Now the death or incapacity may take place at any period of the arbitration. It might happen at the very beginning before an umpire was appointed. It might happen at the very end, when everything had been completed except the award. That section, therefore, does not throw any light upon the question as to the period at which the umpire is to be appointed. In fact down to this time an umpire has not been mentioned at all.

Then we come to the 27th section, which provides for the appointment of an umpire. It says "where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another

NORTH, J. 1885 SHEPHERD v. CORPORATION OF NORWICH.

umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final." Then the next section relates to the proceedings in default of appointment of an umpire, and it says that, "if in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire." Then we come to the 29th section: "If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act," then the matter is to proceed as if he had not been appointed.

Then sect. 30 takes up another case: "If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties." Now, that is the section which applies in the present case. More than one arbitrator has been appointed. One of the arbitrators has refused or for seven days neglected to act, and then the section provides that the other arbitrator may proceed *ex parte*. It does not begin by saying "if more than one arbitrator and an umpire have been appointed." It simply says, "where more than one arbitrator has been appointed." It does not refer to any particular stage of the proceedings. It does not indicate the time further than by saying this—it must be after two arbitrators have been appointed. But I see nothing in the section to say that the arbitration need have gone on a step further than that. Then, in the next place, it is said by the Defendants that, to give effect to this section, the arbitrators having failed to appoint an umpire by the refusal of one to act, the proper course was to apply to the Board of Trade to appoint an umpire, and if the Board of Trade declined to do it, then to get a mandamus to compel them to do it. In considering whether such a case is within the meaning of the Act, if the words are doubtful, it is important to see whether all that would come to anything. It is clear that if an arbitrator is to act *ex parte*,

there is nothing whatever that an umpire can do. His duty is to decide only on matters on which the two arbitrators shall differ, or which are referred to him under the provisions of the Act; that is to say, in case of difference between the other two. He therefore can have nothing to do unless there are two persons who differ from one another, who cannot decide the question without the umpire; and if it is necessary under the 30th section to go through the elaborate process of getting an umpire appointed, it would be for the purpose of appointing a man who could not do anything whatever when he was appointed. Therefore we have now a case very like that under sect. 25, but differing only in this—that under the 25th section only one arbitrator has been appointed, and under the 30th section two have been appointed. It not being necessary to appoint an umpire for the purposes of the arbitration, for the reason I have pointed out, namely, that the umpire, if appointed, would have nothing to do, the question is whether it is necessary by the terms of the Act to go through the form of appointing an umpire as a condition precedent to a single arbitrator proceeding *ex parte* under the 30th section. In my opinion it is not. First of all, looking at the words of the Act, I do not think it comes within the words of the Act at all. The 27th and 28th sections provide for the appointment of an umpire in a particular condition of things and at a particular time. What is the condition required? All that the 27th section says is: "Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire." I think it is clear that, if the two were proceeding to deal with any matter referred to them, it is a condition precedent that they should appoint an umpire; but I can see nothing there to indicate that it is necessary that there should be an appointment of an umpire because one of them desires to proceed *ex parte* under a later section. It seems to me, therefore, that the words of that section do not necessarily or in terms indicate the necessity of an umpire being appointed before one arbitrator proceeds to act *ex parte*, where under the Act he has power to do so: but are confined to the case when two persons are ready and willing to enter upon, and are pre-

NORTH, J.
1885
SHEPHERD
v.
CORPORATION
OF NORWICH.

pared to enter upon, the matters referred to them; and there is nothing pointing to the appointment of an umpire who can have nothing to do in the case, where the arbitrators are not about to enter upon the matters referred to them, but refuse to do so. What is contemplated by the 30th section is one person proceeding *ex parte*. I am asked to read that section as if it had provided for either of the arbitrators refusing or neglecting to act after an umpire has been appointed. There is nothing of that sort in this section. There is nothing that I can find in the Act indicating that those words should be so read, and the general words that are used seem to me to have precisely the same effect as if the section ran, "if, where more than one arbitrator has been appointed, either of the arbitrators, either before or after the appointment of an umpire, refuses or neglects to act," and so on. If the refusal only took place after they had entered upon the matters in difference, then, of course, the umpire must previously have been appointed to make that entry upon the matters in difference between the two, a proper step to take; but if they had not entered on the matters in difference at all, then it appears to me the thing for which the arbitrator was to be appointed, namely, the settlement of the difference between these parties, only points to the settlement in an event that never can arrive, and therefore that this 30th section does not necessarily refer to a case in which an umpire has been appointed. It applies to such a case if that stage of the arbitration has been reached, but I see nothing to prevent it applying at the earlier stage of their not having entered on the matters in difference, if immediately after his appointment one arbitrator refuses to enter upon the matter.

The argument of Mr. *Barber*, which was the strongest on that point, was this. He says that it cannot be said of an arbitrator whether he does or does not refuse, until the arbitrators have been appointed and the umpire has been appointed, and they are ready to enter upon the matters in difference between them. But looking at the facts of this case, it seems to me that, although the Defendants did choose to appoint an arbitrator under protest, they deliberately abstained from going any further—*bonâ fide*, I do not doubt—and gave instructions to their arbitrator not to

act, although they were warned by letter of what the consequences would be. Under those circumstances they deliberately accepted, in my opinion, a position by which they are bound. The result is, I hold that, on the construction of the sections referred to, the appointment of an umpire is not a condition precedent to an arbitrator proceeding *ex parte* under the 30th section, where the refusal by the other arbitrator to act has been a refusal before the appointment of an umpire, and where he actually refused to concur in the appointment of an umpire.

Now three cases were cited as throwing some light upon this matter. One was *Bright* v. *Durnell* (1). In that case there was a clause in a partnership deed that all disputes were to be referred to the arbitration of two persons, who were directed to choose an umpire before they proceeded, but which umpire had not been appointed. There one of the parties revoked the submission to arbitration, and the application to the Court was to compel them to go on. The Court said it could not do so for this reason, that before anything further was done an umpire was to be chosen, and inasmuch as the parties refused to appoint an umpire, and it was impossible to compel them to do so, it was impossible to say the state of things had arisen in which the parties were compelled to go on. That case does not bear upon the two alternatives suggested. One is, proceeding under the arbitration by an appointment of arbitrators and umpire. The other is, where in default of the appointment of an umpire by the Board of Trade the arbitrator of the other has power to go on. The case of *Cudliff* v. *Walters* (2) was somewhat similar. There there was an appointment of an umpire by two arbitrators, under a power to appoint before entering on the cause of the matter in difference. The question there was this, the appointment of an umpire being a condition precedent, whether the award which had been made could be supported, the defect in the award being, if it was a defect, that the award had been made out of time unless the enlargement and the time for making it was good, and the enlargement of the time for making the award had been made by the arbitrators before the umpire had been appointed. It was said that that act done by them was illegal, and there-

(1) 4 Dowl. 756.

(2) 2 Mood. & Rob. 232, 235.

NORTH, J.
1885
SHEPHERD v. CORPORATION OF NORWICH.

fore the time was not legally extended, and the award was made too late. It was a Nisi Prius case, and the report states that, "Mr. Justice *Coleridge*, in summing-up, said that he had no doubt of the appointment of the umpire being valid. That the object of this clause in agreements of reference was to insure the appointment of an umpire before the minds of the arbitrators became embarrassed by the discussion of the matters in difference." Those words were relied on. If that is the object of the clause, the present case is not within it at all, because there has been no discussion of the matters in difference between the arbitrators before the appointment of an umpire. It is a case in which the matter was never discussed between them at all, but was left entirely to one. The object, therefore, of the requirement that an umpire should be appointed as a first step, does not apply to a case in which there is no discussion between them, but the matter is left entirely under the control of one by reason of the other having declined to enter into the matters in difference altogether. The third case was *Skerratt* v. *North Staffordshire Railway Company* (1). There the real question was at what time an umpire had to make his award—from what time the three months he had were to run—whether it was to be from the day of the appointment of the last arbitrator, or from the day when the arbitration devolved upon the umpire. That decision, therefore, does not affect this case, but the Lord Chancellor said this in his judgment, which is relied upon by the Defendants: "The 27th section of the Act provides that where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, appoint an umpire. That, then, is their first duty, before any question of disagreement between them has arisen. Then the 31st section provides that if the arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time as shall have been fixed by them for that purpose, the matter shall be determined by the umpire; and that extended time is subject to the limitation of the 23rd section, which provides that, if the arbitrators or their umpire shall for three months have

(1) 2 Ph. 475, 476.

failed to make their award, the question shall be settled by the verdict of a jury." That is saying, with reference to the *Lands Clauses Act*, what Mr. Justice *Coleridge* said with reference to the particular document before him in the case I referred to last. But the Lord Chancellor is speaking of the duty to appoint an umpire before the arbitrators enter upon the matters referred to them, and before any question of disagreement has arisen between them—that means disagreement upon the matters in difference. It is pointing out the time at which they must appoint an umpire where an umpire has to be appointed, but does not suggest to me that the Lord Chancellor had in his mind for a moment the question whether a man who proceeds to act *ex parte* as arbitrator under the 30th section has acquired those powers by reason of the two persons named in the 27th section not having appointed an umpire before they enter upon the matters referred to them in a case in which they had never entered on those matters at all. Those cases, therefore, do not affect the matter before me.

Under these circumstances, it seems to me that the course adopted by the Plaintiff in this case was right, and that on this point the Defendants fail, and the case must proceed.

The validity of the notice to treat was then argued.

W. W. Karslake, Q.C. (*Cozens-Hardy*, Q.C., with him), and *Sturges*, for the Plaintiff:—

If a proper formal notice to treat gets into the hands of the real owner, that is a sufficient and good service. The notice was properly served on *Wellington*, who was in occupation of part of the property, and the agent of the Plaintiff. But if the service was irregular, yet the general words at foot of the notice include the real owner, and the notice having come into the hands of the real owner, the Plaintiff, bound him: *Metropolitan Railway Company* v. *Woodhouse* (1). And it was competent for the Plaintiff to waive the irregularity and to adopt the notice, which he did. The Defendants could not withdraw their notice to treat, and cannot now take advantage of their own negligence and say that it is a nullity because it was not served personally on the Plaintiff.

(1) 34 L. J. (Ch.) 297.

NORTH, J.
1885
SHEPHERD v. CORPORATION OF NORWICH.

The fact that their compulsory powers expired on the 21st of July, 1883, did not invalidate the notice to treat: *Tiverton and North Devon Railway Company* v. *Loosemore* (1).

Barber, Q.C., and *R. S. Wright*, for the Defendants:—

There has been no proper service of a notice to treat on the Plaintiff. There must be such a service as binds both parties: *Reg.* v. *Great Northern Railway Company* (2). The service on *Wellington* was insufficient, because he was occupier of only part of the premises comprised in the notice to treat; and further, the occupier can only be served when the owner cannot be found, which was not the case here. The service on *Barber* was also insufficient. He was a bare trustee for the Plaintiff: *Peters* v. *Lewes and East Grinstead Railway Company* (3); *Earl of Harrington* v. *Metropolitan Railway Company* (4). Lastly, the general words at the foot of the notice are mere surplusage, and were never intended by the Legislature to bind the real owner.

W. W. Karslake, in reply.

NORTH, J.:—

In this case there is a further point for decision arising upon the *Lands Clauses Act*, and that point arises in this way. In the month of August, 1881, a person named *Wellington* agreed to buy from an owner named *Barber* the houses with respect to which a notice to treat is alleged to have been given, and a timber-yard behind those houses. Towards the end of 1882 *Wellington*, who paid part of the purchase-money, was apparently in difficulties. He communicated with *Shepherd*, a person with whom he did business, and to whom he owed a good deal of money. It appears that then an action for specific performance by *Wellington* against *Barber* was instituted at *Shepherd's* instance, *Shepherd* having determined to take over the property under some arrangement between him and *Wellington*, the particulars of which are immaterial. But on the 16th of January, 1883, that action was compromised, and a meeting took place between the parties.

(1) 9 App. Cas. 480.
(2) 2 Q. B. D. 151, 154.
(3) 18 Ch. D. 429.
(4) 13 L. T. (N.S.) 658.

Shepherd paid £3000, the balance of the purchase-money, and had all the deeds handed over to him. That was done with *Wellington's* concurrence, and thereupon an arrangement was made between the three by which *Shepherd* stood in the place of *Wellington*, and was to have the contract carried out in his favour. The conveyance to *Shepherd* was delayed, partly by reason of the ground-landlords requiring certain repairs to be done before they assented to the assignment, and partly on other grounds which are not material. But ultimately, in December, 1883, the assignment by *Barber* to *Shepherd* was completed. It is unnecessary to decide what interest *Wellington* had in the occupation of the land down to January, 1883; but in January, 1883, when *Shepherd* took *Wellington's* place, *Wellington* became tenant of the timber-yard behind the houses, and he also became tenant of a small portion of the frontage—the rest of the frontage, which comprised six or seven shops, was in the occupation of other persons. He was also manager and agent for *Shepherd*. This also appears, that for reasons of his own, *Shepherd* did not wish to be known as the purchaser of this property, and therefore it was treated as if it was *Wellington's*, and certain contracts were entered into for letting some of the shops, and those were all entered into in *Wellington's* name. He was, therefore, ostensibly the owner of part of the property at any rate. On the 18th of July, 1883, a notice to treat by the corporation was delivered to *Wellington*. It was in the usual form, and was addressed to and handed to him; and then at the foot of it were the printed words which are found, as far as my experience goes, in all notices to treat under the *Lands Clauses Act*, "And to all persons having or claiming any estate or interest in the said land and hereditaments." Then it appears that *Wellington* took the notice which he had received and handed it to *Prior*, the solicitor for *Shepherd*, and he also wrote to Mr. *Shepherd* on the same evening. But it does not appear that he sent the document, and it does not appear that the notice ever, as a matter of fact, came into the hands of *Shepherd* at all. That was on the 18th, and the time for giving notice under the Act expired on the 21st of July, because the compulsory powers conferred on the Defendant by this special Act expired on the 21st of July, 1883.

NORTH, J. 1885 SHEPHERD v. CORPORATION OF NORWICH.

But omitting for a moment what happened afterwards, the question is, whether at this time that notice to treat, so given, constituted a relation between the parties which entitled either of them to have the proceedings so initiated carried out. Now the position of parties where a notice to treat has been given was for some time a subject of discussion and of conflicting decisions; but it has been settled for many years, and it is stated very clearly in the case of *Tiverton and North Devon Railway Company* v. *Loosemore* (1). There (2) Lord *Blackburn* points out what the result of such a notice is, and, says: "The effect of this, as is now settled, was to create a relation between the company and the respondent analogous to that of purchaser and vendor, but the price was not yet ascertained. Till that was done the land still remained the property of the respondent, in equity as well as at law, but the company had acquired a right to have the price ascertained, and for that purpose to summon a jury, and then, when the price is ascertained (by sects. 69 to 80), on tender of the price to have the land conveyed to them, or if the landowner could not or would not make a title, to deposit the price ascertained in the bank, and execute a statutable conveyance, on which the lands shall vest absolutely in the promoters of the undertaking. The landowner has a correlative right; if he pleases, he may at any time before the company have issued their warrant for summoning a jury, have the amount of compensation settled by arbitration, and, if the company do not issue a warrant for summoning a jury, he may by mandamus compel them to do so;" and then he went on to point out the further result of that state of things, which I need not stop to read now. He points out that the right must be mutual, that both parties must be bound. Earl *Cairns*, in his judgment in the same case, points out the same thing very clearly. He says (3): "It is implied, rather than actually decided, in some of the observations in the Court of Appeal that, in a case like the present, the landowner might have the choice of two rights,—a right to get back his land, if he wished to do so, and also a right, if he preferred it, to get compensation for its value under the *Lands Clauses Act*. Let us

(1) 9 App. Cas. 480. (2) 9 App. Cas. 493.
(3) 9 App. Cas. 490.

inquire how far this is possible. I do not dwell on the singular position in which the company would, on the 20th of July, 1880, find themselves, not knowing whether they were or were not rightfully in occupation of the land, until the respondent would elect which of his remedies he would pursue;"—then he proceeds to the important part—"But, passing from this, I must observe that if the landowner is entitled to and desires to receive compensation he must, in order to ascertain the compensation value of the land, call upon the company, and, if necessary, force them by legal proceedings to summon a jury or appoint an arbitrator. But if the company can be forced to do this, they must have the power to do it; and if they have the power to do it, their power must, even after the expiration of five years, be, for this purpose, a continuing power." Then he goes on to deal with the particular facts there, which I need not refer to further. The same thing was pointed out very clearly by Lord Justice *Lush* in the case of *Reg.* v. *Great Northern Railway Company* (1). His observations in the course of the argument seem to me precisely in point here. The service of the notice in that case was very like the service here. It was served upon a person at the office of the plaintiff, which was not the right place. Although the remarks made by Lord Justice *Lush* were only made in the course of the argument, yet they seem to have disposed of that part of the case altogether, in the opinion of the Court, because there was no further argument on that point, and the judgment of the Court afterwards proceeded on the assumption that that point had been decided by what Lord Justice *Lush* had said.

Now the notice in this case was given under the 18th section of the *Lands Clauses Act*, which requires that where the promoters want to take land "they shall give notice thereof to all parties interested in such lands . . . . and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof." Then it requires certain things to be contained in that notice. The notice in the present case complied with the forms required by that section. Then the 19th section proceeds to deal with the way in which the notice is to be served. It says: "All notices

(1) 2 Q. B. D. 151, 154.

NORTH, J.
1885
SHEPHERD v. CORPORATION OF NORWICH.

required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands"—clearly taking up the 18th section and pointing out what is to be done under that—"shall either be served personally on such parties or left at their last usual place of abode, if any such can after diligent inquiry be found, and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands." Those are the modes in which service is to be effected. It is said there is another way, and, if there is one other way, I do not see why there should not be a good many other ways. But it seems to me that if parties are insisting upon their rights under this statute, those are the only ways; and that one of those ways must be followed if the parties are intending to have their rights carried out under this Act. Of course notice might be given in a different way, and if it is accepted, well and good. That may be a good contract outside the Act; but if the notice under which the rights of the parties are to be enforced is given under the Act, it appears to me that it must be given in one of the ways prescribed by the Act, or it is not a good notice under the Act. Now, in the first place, the notice here was not served personally: that there is no doubt about. Then, again, it was not left at the last usual place of abode of the Plaintiff: that is also perfectly clear. But then it is said, it was left with the occupier of the land. In point of fact it was not left with the occupier of the land. It was left with the occupier of a small part of the land, about one-seventh or one-eighth of the land, comprised in the notice, and no more; and the persons who occupied the rest of the land were not served with this notice at all. They were only served with the usual notices given to persons who are in occupation as tenants. Even if *Wellington* had been the occupier of the whole, service on the occupier will not do unless it turns out that the owner cannot, after diligent inquiry, be found. There is no doubt whatever that here he could have been found. He came forward as soon as he was wanted, and he could have been found at the time at which the notice was served,

if the parties had made any investigation about it, or if they had asked any question of *Wellington* or *Wellington's* solicitor. Then it was suggested that the promoters cannot be heard to say that they had not made sufficient inquiry, that they cannot set up their own remissness to avoid a notice so given. But, according to the opinion of Lord Justice *Lush*, it is clear that they can; and in the next place it does not appear that the notice which was served upon *Wellington* was a notice served upon him as representing an absent owner, as distinguished from a notice given to him as being himself in occupation of part of the premises. Under the section, if there was to be a notice served upon him as representing the absent owner, it must be something different from the notice given to him as being the person in occupation. It seems to me, therefore, that in point of fact the notice never reached the Plaintiff's hands by the 21st of July, 1883; and none of the modes of substituted service, if I may so call them, pointed out by the 19th section, were complied with at all.

Then it is said that at the utmost there was an irregularity which was cured when the Plaintiff accepted the notice and proceeded to give certain counter-notices under it. Now the question I have to consider is, not whether the Plaintiff elected to take certain steps under it, but whether he was bound by it: whether, if he had not chosen to do anything further but to object to it, there was a service that would have been good, and would have enabled the Defendants to enforce the completion of the initiated arrangement upon him. With respect to that, it appears to me that there was no service whatever upon him that would have been good. But further than that, it is said that what subsequently passed between the parties amounted to a further bargain of some kind. What is relied upon is the notice which the Plaintiff, as the owner of the property, gave to the Defendants on the 30th of July, 1883, requiring them to take the whole of the property under the 92nd section of the Act. Now that notice does not say that he is ready and willing to sell the whole. It would not be a valid notice unless he was ready and willing to sell the whole. But I will assume for this purpose that the giving of that counter-notice amounted to an offer to sell the whole and an expression of willingness and power to sell the whole. But that is not what

NORTH, J. 1885 SHEPHERD v. CORPORATION OF NORWICH.

it is said to be. It is said to be an adoption of the proposal initiated by the notice to treat. It seems to me to be nothing of the sort, but just the opposite. It was a repudiation of that instead of an acceptance of it. It was equivalent to this: "I will not sell you that part. I am not bound to sell it to you. I will not sell it to you. I am quite willing however to sell you the whole, if you like to take the whole; but I decline to carry out the notice which you have given me to take part." The result of that was this, that the Defendants were at large, and they were in the same position then, while that counter-notice was pending, as if no notice had been given. As a matter of fact, therefore, instead of the Plaintiff accepting the notice, assuming that he could accept it, he repudiated it, although he expressed a willingness to have a different offer by him accepted. Then on the 10th of April, 1884, he proceeded to withdraw that notice, and the question is, what the effect of that was. I will assume now the construction of the counter-notice to be what I suggested just now, an offer to sell the whole. Down to that time there had been an option to the Defendants to take the whole, if they pleased; but on the 10th of April, 1884, that offer to take the whole was withdrawn. The effect of that was, not to adopt the limited notice to treat, but to leave matters exactly where they were before the counter-notice was given on the 30th of July, 1883. At that time there does not seem to me to have been any acceptance whatever of the notice, as a good notice. Then, on the 30th of April, 1884, the Plaintiff gave notice that he wanted to have the claim settled by arbitration, and on the 6th of June he appointed *Hunter* his arbitrator, and on the same date he called upon the Defendants to appoint an arbitrator. Now it is clear that on the 17th of June, 1884, the Defendants had taken up this position. They gave a notice at that time to the Plaintiff denying any jurisdiction whatever, denying that there was anything that could be enforced or that the Plaintiff was entitled to have performed. That notice contains on the face of it a definite statement by them that in their view they are not bound at all, that the Plaintiff's appointment of an arbitrator was good for nothing, and that they only went through the form of appointing an arbitrator of their own (under protest) to prevent the

Plaintiff from appointing his own arbitrator to act for both parties, and so proceed under the 25th section. Now under these circumstances I do not see anything whatever amounting to such a taking upon himself of the duty of carrying out the proposed sale and purchase as could prevent the Plaintiff at any time, if he chose, from turning round and saying "I have not received the proper notice, and I am not bound by what you have done." It appears to me quite clear that he could have done so, and, that being so, it seems to me quite clear the Defendants were not bound.

There is only one thing further for me to refer to, which is this: It was suggested that this was a good notice to the Plaintiff because it eventually came to his hands and was addressed to *Wellington* "and to all others whom it may concern;" and that as the Plaintiff was one of the persons it concerned, he might take it up and act upon it. Willingness on his part to act upon it does not seem to me to be material for the reasons I have pointed out. There must be something to bind him to act upon it, whether he liked it or not, before the Defendants could be bound by it. It seems to me that to bind him there must be service under the Act, and that to bind the corporation therefore there must also be service under the Act, and that it is impossible for him to say that the present notice was one which, if he chose to take up, he might take up; any more than if he had picked it up in the street and taken it home instead of its being handed to *Wellington* or his solicitor. I should add this further. It seems to me it never really came to the Plaintiff's hands at all, and that if, in point of fact, it did come to his agent or solicitor, that is not enough under the Act. There is nothing to shew that *Wellington* was such an agent as had any authority to accept service of such a notice on behalf of *Shepherd*, and of course his solicitor had not any such authority. An agent or solicitor might have such authority, but there must be something to shew that he had. You cannot infer it from his position, which is all I should have to infer it from here; and even if I had come to the conclusion that there was such an authority, it seems to me that an authorized agent is not a person upon whom service under the Act of a notice to treat can be effected so as to bind the principal of that agent,

NORTH, J. 1885 SHEPHERD v. CORPORATION OF NORWICH.

and therefore it cannot bind the Defendants. The result is that, there being no valid notice to treat, there is nothing in respect of which I can grant a mandamus to the corporation to take any further proceedings. The action must therefore be dismissed with costs.

Solicitor for Plaintiff: *C. F. Martelli*, agent for *Turner & Prior, Norwich.*

Solicitors for Defendants: *Sharpe, Parkers, & Co.*, agents for *H. B. Miller, Norwich.*

H. L. F.

NORTH, J. 1885 *Aug.* 11.

WHETHAM *v.* DAVEY.

[1884 W. 2198.]

Partnership—Mortgage of Share—Foreclosure—Date at which Account of mortgaged Share is to be taken—Form of Order.

When a partner mortgages his share in the partnership and the mortgagee brings an action to realise his mortgage, the proper order is to direct an account of what the mortgagor's interest in the partnership was at the date when the mortgagee proceeded to take possession under his mortgage, *i.e.*, at the date of the writ; but if a dissolution of the partnership has previously taken place, the date of the dissolution is the date at which the account is to be taken.

By deed, dated the 1st of January, 1872, and made between the Defendant *A. S. Davey* of the first part, the Defendant *G. Alder* of the second part, and *F. Thompson* of the third part, the Defendants *A. S. Davey* and *G. Alder* and *F. Thompson* entered into partnership as merchants and wharfingers under the style of *Davey, Thompson, & Alder*, for a term of seven years from the 1st of January, 1872. The articles of partnership contained a stipulation that no partner should do anything whereby the partnership assets might be seized, attached, or taken in execution; but did not otherwise prohibit a partner from assigning his share.

On the expiration of the seven years the partnership was continued for a further period of three years on the conditions of the deed of partnership of the 1st of January, 1872; and on the expiration of the further period of three years the partners

continued to carry on the partnership business on the conditions and subject to the provisions contained in the deed of January, 1872.

By deed dated the 6th of April, 1882, and made between *F. Thompson* of the one part, and the Plaintiffs, who were the trustees of the *National Provident Institution*, of the other part; after reciting that the Plaintiffs had issued a writ of *elegit* under a judgment recovered by them against the said *F. Thompson* in the Queen's Bench Division on the 5th of April, 1882; and that the sheriff had taken formal possession under such writ at one or other of the places of business of the said firm of *Davey, Thompson, & Alder* with the view of realising the share and interest of the said *F. Thompson* in such business; and that the Plaintiffs had agreed with him to withdraw the sheriff from possession in consideration of the assignment thereinafter made; it was witnessed that the said *F. Thompson* in consideration of the premises assigned to the Plaintiffs all his share and interest in the said partnership business and the assets and property thereof by way of mortgage to secure the payment of the sum of £26,000, and the interest thereon.

Notice of this mortgage was on the 8th of April, 1883, duly given by the Plaintiffs to the Defendants *Davey & Alder*.

On the 27th of November, 1883, the Defendants *Davey & Alder*, in consequence of breaches of the partnership articles committed by *F. Thompson*, in exercise of a power contained in the deed of partnership of the 1st of January, 1872, dissolved the partnership theretofore subsisting between themselves and *F. Thompson*, and from that date carried on the business without him.

On the 29th of December, 1883, *F. Thompson* was adjudicated bankrupt, and the Defendant *Henderson* was duly appointed the trustee in his bankruptcy.

On the 20th of June, 1884, the Defendant *Henderson* commenced an action against the Defendants *Davey & Alder* to take the accounts of the late partnership, and the accounts were accordingly submitted to him and approved of by him, and thereupon all further proceedings were stayed in that action. These accounts extended from the 31st of July, 1883, to the 31st of December, 1883, and shewed a balance due from *F. Thompson* to his late partners.

NORTH, J.
1885
WHETHAM
v.
DAVEY.

The present action was commenced on the 21st of June, 1884, the Plaintiffs claiming that under and by virtue of the deed of the 6th of April, 1882, they had a valid charge on the share and interest of *F. Thompson* in the assets and business of the late partnership; an account of what was due to them on the security of the deed; and that the partnership accounts might be taken under the direction of the Court, and the share of *F. Thompson* applied in payment of their mortgage debt and interest.

The Defendants, *Davey & Alder*, by their statement of defence, offered to allow the Plaintiffs to take the accounts of the late partnership on the footing that no partnership dealings or transactions or application of the partnership assets prior to the issue of the writ were disturbed; but denied the right of the Plaintiffs to take the accounts at all if the Plaintiffs insisted on having the accounts taken to any greater extent than offered. Issue was joined, and this was the trial of the action.

Barber, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

The question is, as from what date the mortgagee of a share in a partnership is entitled to an account of the share and interest of the mortgaged partner. There is no direct authority on the point; but under the circumstances we are entitled to an account from the date of the mortgage at any rate, because the other partners had formal notice of the mortgage at the time and did not then object, or insist on *Thompson* going out. In fact, they waived their right to a dissolution at that time and continued the partnership, therefore we are entitled to know what has been done in the partnership since then: *Fawcett* v. *Whitehouse* (1); *Redmayne* v. *Forster* (2); *Glyn* v. *Hood* (3); *Lindley* on Partnership (4); *Williams* v. *Poole* (5).

[NORTH, J.:—In *Williams* v. *Poole* the plaintiff was trustee under a trust deed.]

Yes, but we contend that an assignee of a share in a partnership is entitled to an account of the partnership, although the result of the account may be to raise very important points between

(1) 1 Russ. & My. 132.
(2) Law Rep. 2 Eq. 467.
(3) 1 D. F. & J. 334.
(4) 3rd Ed. p. 1003.
(5) 21 W. R. 252.

the assignor and other partners. An assignee by operation of law is entitled to such an account: *Seton* on Decrees (1). Why should a distinction be drawn between an assignee by operation of law and any other assignee? We are not bound by anything that *Henderson*, the trustee in bankruptcy, did in his action.

Warmington, Q.C., and *Farwell*, for the Defendants *Davey & Alder*:—

Apart from authority, if a mortgagee of a share in a partnership is entitled to an account from the date of his mortgage it would be disastrous to the general course of business. Such a mortgage is very like a floating security given by a company. It does not pass any particular asset or prevent the partnership business from being carried on: but when the mortgagee takes proceedings to enforce his security, then he must take it as he finds it, and cannot disturb anything that has taken place between the partners in the meantime. In this case, therefore, the Plaintiffs are only entitled to an account as at the date of the writ, or, at the earliest, at the date of the dissolution: and the account rendered to the trustee in bankruptcy shews that at that date nothing was due to *Thompson* in respect of his share. This account, therefore, is unnecessary, for what binds the assignor binds his assignee, and there is no privity between the assignee and the other partners: *Kelly* v. *Hutton* (2); *Cavander* v. *Bulteel* (3); *Brown* v. *De Tastet* (4); *Cassels* v. *Stewart* (5). The case is analogous to those in which the sheriff under an *elegit* has seized a judgment debtor's share in a partnership: *Parker* v. *Pistor* (6); *Lindley* on Partnership (7). The sheriff sells the interest of the debtor, and the inquiry in form is what was the interest of the judgment debtor at the date of the judgment. In *Seton* on Decrees (8) a form of order suggested by Lord Justice *Lindley* is quoted.

[NORTH, J.:—Does not the account there suggested mean an account of the partnership?]

(1) 4th Ed. p. 1208.
(2) Law Rep. 3 Ch. 703.
(3) Ibid. 9 Ch. 79.
(4) Jac. 284.
(5) 6 App. Cas. 64.
(6) 3 B. & P. 288.
(7) 3rd Ed. p. 709.
(8) 4th Ed. p. 1214, n.

NORTH, J.
1885
WHETHAM
v.
DAVEY.

No: it means an account of what is due for principal and interest on the judgment debt. If an account of the partnership was intended, then the second part of the order would go behind the first part.

[NORTH, J.:—*Kelly* v. *Hutton* (1) seems to be against you.]

We submit not. There the account was only taken from the last settled account between the partners. We do not object to an account here from the date of the mortgage provided it is taken without disturbing any settled accounts and transactions between the partners.

Yate Lee, for the Defendant *Henderson*, the trustee in bankruptcy of *Thompson*.

Barber, in reply:—

On general principles we are entitled to an account of all the partnership dealings and transactions from the very commencement of the partnership, subject, no doubt, to any settled account between the partners; but we are content to take it from the date of the mortgage. There is no precedent for fixing the account at the date of the writ or the date of the dissolution.

NORTH, J.:—

The question as to the form of decree to be made in cases of this kind does not seem to have been very clearly settled; but I shall be doing what I think right, and what I think comes nearest to the decided cases, in making an order that an account be taken of what the interest of *Thompson* was at the date of the dissolution.

It is suggested by the Defendants that it ought to be from the date of the issue of the writ; but, inasmuch as the writ was issued after the dissolution, I think it is clear that it must go back to that time at any rate—and I do not think that was seriously disputed by the Defendants. But the Plaintiffs ask that, instead of directing an account of what was the interest of *Thompson* at that time—that is to say, ascertaining the state of things at the end of the account—I ought to go back to the beginning of the

(1) Law Rep. 3 Ch. 703.

account and direct from what time it is to commence: and, by way of concession and giving up a right, they say they are content to take it from the date of the mortgage, the 8th of April, 1882. It seems to me that, if it is right to commence from that time, it will be necessary to go back further still, because it will be necessary to find out what the state of the assets really was at that time; and to do that all the earlier accounts will have to be taken.

Now it seems to me that it is impossible to direct, at the instance of a mortgagee of a share in a partnership, an account to go back and take all the accounts of the partnership long before he became a mortgagee at all. I think the proper course is to direct an account of what the interest of the mortgagor was at the time when the mortgagee proceeded to enter into possession under his mortgage. Therefore, if there had been no dissolution in this case, I should have said that the proper date was the issue of the writ; and it is only because the dissolution took place before that time, that I consider the inquiry must go back to the date of the dissolution. That form of order seems to me, more nearly than any other, to correspond with the cases that have been cited.

First of all, taking the case of realising the share of a judgment debtor partner by a sheriff under an execution against the share of that partner, the course adopted is this. The sheriff puts up the property for sale, and what the person purchasing from him gets is such a sum as represents the interest of the execution debtor in the concern. The form of order proper to be made in such a case is set out in a note in *Seton* (1), where the editors remark that they are indebted to Lord Justice *Lindley* for the form of order there suggested: "A reference to the Master (or the Chief Clerk) to inquire and state the value of the judgment debtor's interest in the partnership assets." That is what, as it seems to me, I must follow here. Then the case of *Redmayne* v. *Forster* (2), which comes nearest to it of all that I have seen, points to the same thing. There the account directed was "an account of what are the debts and liabilities which the partnership is now liable to pay, and to ascertain what proportion of such debts and

(1) 4th Ed. p. 1214, n.

(2) Law Rep. 2 Eq. 478.

NORTH, J. 1885 WHETHAM v. DAVEY.

liabilities, as between the plaintiff and the other partners, is properly attributable to the mortgaged shares." Those are the two cases which, as I have said, come nearest to this. Therefore the account must be in that form. There must also be an account of what is due to the Plaintiffs in respect of their debt, and further consideration must be reserved.

When the accounts are worked out in Chambers, and the account is taken of what the share of the mortgagor partner is, it seems to me clear that the account will have then to be taken as between the partners; and it will have to be taken upon the footing that the partner who mortgaged his share, and who was left in possession, was acting for and was agent for his mortgagee, who was content to leave the matter in his hands. I do not make any declaration upon that point, but that seems to me to be the law in respect of which, and upon the footing of which, that account will have to be taken.

I do not make any order at present as to the costs, because I find that although the Plaintiffs have claimed certainly more than it seems to me they were entitled to, at the same time the Defendants have set up a greater right against the Plaintiffs than I think they were entitled to set up. Therefore the costs will be reserved.

Order accordingly.

NOTE.—The following is the form of the Order as drawn up by the Registrar:—This action coming on this day for trial, &c., this Court doth order that the following inquiry and account be made and taken, namely, 1. An inquiry of what *Frederick Thompson's* share and interest in the assets of the partnership in the pleadings referred to consisted at the date of the dissolution of the said partnership. 2. An account of what is due to the Plaintiffs under or by virtue of their mortgage security of the 6th of April, 1882, in the pleadings mentioned. And it is ordered that the further consideration of this action be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

Solicitors for Plaintiffs: *Davidson & Morriss.*

Solicitors for Defendants: *R. F. Brunskill; Alsop, Mann, & Co.*

H. L. F.

JOHNSTONE *v.* EARL SPENCER.

NORTH, J.

1885

June 17, 18, 19, 22; *Aug.* 12.

[1883 J. 563.]

Copyholds—Purchase of several distinct Tenements under one Disposition—Right to split Admittance—Fines—Special Custom—Evidence.

There is no general copyhold law that, in manors in which a fine is only payable on the first admittance of a tenant, a purchaser of several distinct copyhold tenements under one disposition—whether a will, or surrender, or otherwise—is entitled as of right to split his admittances, i.e. is entitled to compel the lord of the manor to admit him to any one or more of such several tenements, and to take admittance to the others at any subsequent time, as and when he pleases.

A special custom in a manor, that a purchaser of several distinct copyhold tenements under one disposition, must take admittance to all at one and the same time, and pay one general fine in respect of all, is good.

Such a special custom may be evidenced by a uniform course of practice or usage in the manor for a number of years, although it does not otherwise appear either on the Court rolls, or in any custumal or other record, of the manor.

THE Plaintiffs were the devisees in trust, under the will of one *John Scott*, deceased, of several distinct copyhold tenements of the manor of *Wimbledon*, in the county of *Surrey*, to which *John Scott* had during his life at various times been admitted. The Defendant was the lord of the manor.

It was a custom of the manor that a purchaser on his first admittance paid a fine, but paid no fine on any subsequent admittances, "because he was a tenant before."

The Plaintiffs were not copyhold tenants of the manor, but claimed, as such devisees in trust, to be admitted in the first instance to one small several tenement of about half an acre on payment of the fine due in respect thereof; which admittance, they claimed, would entitle them to be admitted to all the other tenements of which they were devisees in trust, and which were of considerable value, without payment of any further fine.

The Defendant denied the right of the Plaintiffs to be so admitted, and insisted that, by a special custom of the manor, a purchaser of several distinct tenements under one disposition was

NORTH, J.
1885
JOHNSTONE v. EARL SPENCER.

not entitled to be admitted to any one of them without paying one general fine in respect of all of them.

The Plaintiffs denied the special custom, and further alleged that any such special custom was oppressive and unreasonable, and therefore void.

Barber, Q.C., and *Elton*, for the Plaintiffs.

Davey, Q.C., *Giffard*, Q.C., and *C. T. Simpson*, for the Defendant.

The facts and the arguments are fully stated in the judgment.

The following authorities were referred to in the course of the arguments:—*Hobart* v. *Hammond* (1); *Taverner's Case* (2); *Traherne* v. *Gardner* (3); *Everest* v. *Glyn* (4); *Rex* v. *Boughey* (5); *Rex* v. *Hendon* (6); *Denn* v. *Spray* (7); *Roe* v. *Parker* (8); *Chapman* v. *Cowlan* (9); *Roe* v. *Ireland* (10); *Duke of Portland* v. *Hill* (11); *Marquis of Anglesey* v. *Lord Hatherton* (12); *Evelyn* v. *Worsfold* (13); *Reg.* v. *Garland* (14); *Fraser* v. *Mason* (15); *Scriven* on Copyholds (16).

Aug. 12. The following written judgment was delivered by

NORTH, J.:—

The Plaintiffs in this action are the trustees under the will of one *John Scott*, who died on the 18th of January, 1859, having been in his lifetime admitted tenant of several copyhold tenements held of the manor of *Wimbledon*, of which the Defendant is the lord. One of those properties was a piece of land containing about half an acre, of small annual value, to which *Scott*, upon the surrender of one *Fitzgerald*, had been admitted tenant on the 28th of April, 1841. By a deed-poll executed by him on the 5th of

(1) 4 Rep. 27 b.
(2) Ibid. 27 a.
(3) 5 E. & B. 913.
(4) 6 Taunt. 425.
(5) 1 B. & C. 565.
(6) 2 T. R. 484.
(7) 1 T. R. 466.
(8) 5 T. R. 26.
(9) 13 East, 10.
(10) 11 East, 280.
(11) Law Rep. 2 Eq. 765.
(12) 10 M. & W. 218.
(13) 15 L. T. (O.S.) 4.
(14) Law Rep. 5 Q. B. 269.
(15) 10 Q. B. D. 398; 11 Q. B. D. 574.
(16) 6th Ed. pp. 168, 169.

June, 1847, about eight perches of that land were conveyed to the *London and South Western Railway Company*. The remaining portion was his at the time of his death, and is known in this case as *Fitzgerald's* tenement. *Scott* was also admitted to divers other tenements held of the manor of *Wimbledon* of very considerable value, as to part on the 6th of May, 1840, and as to the residue on the 12th of May, 1856. A portion of the former (rather less than one acre) was also conveyed by him to the same railway company on the 5th of June, 1847: and a further part containing half an acre he in 1841 exchanged for *Fitzgerald's* property. By his will, dated the 12th of January, 1859, *Scott* devised all his real and personal estate to the Plaintiffs (and two other persons who disclaimed) upon trust to make certain payments, which have all since been satisfied, and, subject thereto, he empowered them to sell any part of his estate, and directed them to convey the residue to the trustees of a certain settlement dated the 17th of February, 1851. The testator was at the time of his death owner of all the copyholds to which he was so admitted, except the small portions which he had disposed of, as I have mentioned. Since his death no one has been admitted to any part thereof. The property consists of many different tenements. The Plaintiffs have recently contracted to sell a part thereof, not including *Fitzgerald's* tenement; and the trustees of the settlement of 1851 have called upon them to convey, and the Plaintiffs are desirous of conveying, the rest of the copyholds, including *Fitzgerald's* tenement, to those trustees. Before they can carry out the sale and conveyance respectively they must be admitted. They now call upon the lord to admit them to *Fitzgerald's* tenement only, and offer to pay the customary fine thereof: and they propose, according to their pleadings, to take admission to the rest subsequently, as may be convenient. The Defendant declines to admit them to *Fitzgerald's* tenement alone, on the ground that, according to the custom of the manor, he can require them to be admitted at the same time to all the copyhold tenements comprised in the devise to them. The cause of the contest between them is, that according to the custom of the manor, every new purchaser (in the legal sense of the word) of customary land pays a fine on his first admission, but does not pay any fine upon any subsequent admissions

NORTH, J. 1885 JOHNSTONE v. EARL SPENCER.

to any other customary lands. Not one of the Plaintiffs is a copyhold tenant of the manor. If, therefore, they can succeed in procuring admittance to *Fitzgerald's* tenement alone on payment of the small fine due in respect thereof, they will subsequently claim to be admitted to the remaining tenements without paying any further fine: whereas, if they are admitted to all the tenements at the same time, the amount payable for fines will be considerably larger. I need hardly say that the thing really in dispute is the sum to be paid by the Plaintiffs in respect of fines. If that question were once settled, the lord of the manor would be ready to meet the views of the Plaintiffs as to time and order of admittance, and the Plaintiffs would no longer have any reason to wish to take admittances at different times. The relief which the Plaintiffs ask is a declaration of their right to be admitted to *Fitzgerald's* tenement without being admitted at the same time to the other copyhold tenements comprised in the same devise; and a mandamus to the Defendant to compel him so to admit them.

The Plaintiffs' first proposition is, that by the general law a person who is entitled to several copyhold tenements within a manor has a right to be admitted to them in any order he pleases, and a right, if he pleases, to be admitted to one or more without being admitted to all or any of the others. It is not disputed that the lord may have some right of forfeiture or seizure *quousque* in respect of copyholds to which a person entitled to be admitted will not take admittance; but that may be left out of consideration in the present case, because there is no evidence that the Defendant has ever threatened any such proceeding, and so much of the Plaintiffs' pleadings as bears upon that was not even opened to me—and I only refer to it now that the Plaintiffs' first proposition, as stated, may not be misunderstood.

In considering what the general copyhold law is, it must be borne in mind that in most manors the fine paid by a purchaser on admittance is the same, whether such purchaser is actually a tenant of the manor or not; and that the question now raised is of little or no importance in such manors, and is only material in those (comparatively few in number) in which the custom is like that of the manor of *Wimbledon* in this respect. And it must be remembered further that the Defendant's contention

only goes to this, that, where a man is entitled to be admitted to several copyhold tenements under one disposition in one instrument, the lord is entitled to require the tenant to be admitted to all together. To put it in another way, the contention is that a tenant is not entitled to split his admittances so as to take separate admittances at different times of the several tenements comprised in one disposition in his favour. It is surprising to find how little authority there is on the subject. *Taverner's Case* (1) shews how a copyholder of several tenements holds them under several distinct tenures, each having its separate fine, rent, heriot, &c., and a forfeiture of one being no forfeiture of the others: the essence being that each tenement is held under a separate holding, though several tenements may be comprised in one copy. The counsel for the Plaintiffs also relied on the third and fourth points resolved in *Hobart* v. *Hammond* (2), which was as follows: "3. It was resolved, that where a copyholder has several lands severally held by several services by copy, there the lord ought to assess and demand the fines severally for every parcel which is so severally held. For the tenant may refuse to pay the fine for one parcel, and forfeit that, and pay the fines for the others; and as it was agreed in *Taverner's Case*, every several tenure has a several condition in law *tacite* annexed to it; and therefore the lord ought for every several tenure to assess and demand a several fine: so if all the said several copyholds are surrendered to the use of another and his heirs, and the lord admits him *tenendum per antiqua servitia inde prius debita et de jure consueta*, there, as it was also resolved in *Taverner's Case*, the tenures are several, and therefore the fines ought to be severally assessed and demanded. 4. *Popham*, Chief Justice, said, it was adjudged in *Sandes' Case*, that no fine is due to the lord either upon surrender or descent, until admittance; for the admittance is the cause of the fine, and if after the tenant denies to pay the fine, it is a forfeiture." But these cases afford little help to the Plaintiffs, for they merely relate to the position of a tenant after he has been admitted to several tenements, and throw no light upon the question whether he can be compelled to take admittance to all at once or not. Moreover

(1) 4 Rep. 27 a. (2) 4 Rep. 28 a.

NORTH, J. 1885 JOHNSTONE v. EARL SPENCER.

they are dealing with cases where fines are payable for every tenement, and a tenant might prefer to forfeit one tenement by refusing to pay the fine and yet take the others, and do not refer to cases in which a fine is only payable in respect of the tenement to which admittance is first taken. In *Rex* v. *Boughey* (1) the custom of the manor was that a purchaser of a copyhold tenement who was not already a tenant of the manor paid on admittance a larger fine than if he was such tenant. One *Stewart* contracted to purchase the equity of redemption in several tenements from *Littler*, not being already a tenant of the manor. After that *Stewart* purchased from *Booker* a small copyhold tenement of half an acre only and of trifling value, and sought to be admitted to that before he was admitted to the more valuable tenements purchased from *Littler*, and indeed before the time for admittance thereto had arrived, the avowed object being that he might obtain admittance to *Littler's* tenements after he had already become a tenant of the manor and thus reduce the amount of fine payable therefor. The tenant having obtained a mandamus to the lord to admit him to *Booker's* tenement, the return to the mandamus stated the above matters. It was held that the return was not good, and that *Stewart* was entitled to be admitted to *Booker's* tenement at once in the absence of anything to shew that the purchase of that tenement was colourable only and therefore fraudulent. But it will be observed that in that case the title to the several tenements were not all derived under one disposition. The tendered surrender was by *Booker* and wife of *Booker's* tenement only, and there was not any surrender of *Littler's* tenements, the time for which had not arrived. The titles to the two properties were different, coming by separate dispositions by different persons, at different times; and the purchaser had not even become entitled to get in the legal estate in *Littler's* tenements, without which he could not be admitted. That case therefore does not throw any light upon the present, though it might have done so if, after the mortgage had been paid off, the question had been as to the right of the tenant to be admitted to one only of the tenements bought from *Littler* without taking admission to the others also. The case of *Traherne* v.

(1) 1 B. & C. 565.

Gardner (1) was also relied on by the Plaintiffs. In that case a copyhold tenant died seised of four copyhold tenements, to which he had been admitted by four different surrenders at different dates, and which had never been held as one tenement. His devisees claimed to be admitted to all four tenements by one admittance, with one heriot, on paying one set of fees, and they afterwards proposed two admittances instead of one. The lord's steward insisted on four admittances with separate fees on each, and the devisees ultimately took four admittances and paid four sets of fees under protest, and the action was to recover back the excess so paid. It was held that the fees required were too large, and that the Plaintiffs were entitled to recover back a part—but in the course of the judgment it was laid down by Lord *Campbell* that when four tenements were united in one person, he was not entitled to be admitted to all by a single admittance; but that in the absence of any special custom there must be four admittances, as by copyhold law there must be an admittance for each separate tenement; and that whether the tenements were originally separate, or had become so by subdivision, was not material; but that a special custom to the contrary might be good. It is said by the Defendant's counsel that all that was decided was that a tenant could not insist on a consolidation of several tenements against the will of the lord to his prejudice, but Mr. Justice *Coleridge* points out that such an admittance would be against the principles of copyhold law. But it will be noticed that no question arose as to whether the admittances should be made at the same time or not, and the Judge's remarks were not addressed to that point. Mr. Justice *Coleridge* remarked in that case that though there might legally be a special custom under which the lord was not entitled to more than one admittance, still a custom so much in derogation of the principles of copyhold law ought to be made out very clearly, and Mr. *Elton* pressed this upon me as a reason why I should require any special custom set up by the Defendant to be very clearly proved in the present case. I willingly give due weight to this remark, but it must not be forgotten that by the principles of the general copyhold law several rules are in many cases relaxed in favour of the lord

(1) 5 E. & B. 913.

NORTH, J.
1885
JOHNSTONE v. EARL SPENCER.

where the non-relaxation thereof would work unfairly to him. For instance, by the general law the reasonable amount payable for arbitrary fine on admittance is two years' improved value, but where the admittance is of joint tenants, or tenants for lives, the law sanctions a larger fine: and by analogy it appears to me that any argument from an alleged general law that a tenant may take his admittances at such times and in such order as he pleases—founded on the customs of the large number of manors where fines are payable on each admittance, and it is therefore immaterial to the lord whether the admittances are at the same time or not—ought not to have more than due weight given to it with respect to those exceptional manors in which no fine is payable by a purchaser who is already a tenant, and therefore the question what he is entitled and bound to be admitted to on his first admittance is of very great importance. The only other case bearing upon the general law was *Evelyn* v. *Worsfold* (1), cited on behalf of the Defendant, and decided by the Court of Queen's Bench in 1849. In a manor in which by special custom the admittance of a tenant for life did not enure for the benefit of the remainderman, but he also had to be admitted and pay a fine, a tenant for life and remainderman agreed to sell to a purchaser part of a tenement surrendered to them for those estates, and to effect that the remainderman was required by the lord to be, and was in fact, admitted. He refused, however, to pay his fine, and was sued for it, and it was held to be reasonable that he should be required to pay it during the life of the tenant for life, if during that time he wished to surrender his estate in remainder. It was also contended that he ought to be compelled to pay a fine only in respect of that part of the tenement with which he was dealing, and one such instance was found in the Court rolls. But it was held that one instance was not sufficient to prove a customary right for the copyholder to split his admittance, and that it must have been done by consent under arrangement with the lord, and that the lord was therefore justified in his refusal to admit the remainderman to part only of his copyhold tenement. It was argued before me that in that case the parts were not portions of one tenement, but were different tenements;

(1) 15 L. T. (O.S.) 4.

but the rolls of the manor of *Wested* were produced to me in Court, and upon examination I satisfied myself that the copyhold premises which gave rise to that action formed together one tenement only. The Defendant's counsel however insisted that even then the case was an authority in their favour. But I do not think it helps them, for the decision was that a person who claimed to be admitted to part of a tenement could not refuse to pay the whole fine due in respect of that tenement. It is quite a different thing to say that a person entitled to be admitted to one entire tenement, and who offered to pay the whole fine due for that tenement, could not be admitted to it unless he at the same time took admittance to another separate tenement. On the other hand I do not consider it decided by the case of *Traherne* v. *Gardner* (1) that there is any general copyhold law that, in manors in which a fine is only payable on the first admittance of a tenant, a purchaser who takes several distinct tenements under one disposition, one surrender, one devise, can compel the lord to admit him to one of such tenements when the tenant refuses to take admittance at the same time to the other tenements also.

It is now necessary to consider what the rights of the Plaintiffs and Defendant respectively are, having regard to the special customs of the manor of *Wimbledon*. The customs of this manor are to be sought in the first place in the Court rolls, which have been put in evidence, and extend in an almost unbroken series from the reign of *Edward* IV. to the present time. In addition to these Court rolls four custumals or customaries are produced, which have been kept and handed down with the Court rolls. One of these is called the English Customary, and purports to be taken out of "ye blacke boke of *Canterbury*," and partly out of old rolls and customary rolls which rest in the Archbishop's Treasury House at *Canterbury*, and cannot now be found. Its date is unknown. The second was made in the fourteenth year of King *Henry* VII. (1498 or 1499). The date of the third is not known; nor is that of the fourth, called the M. H. Custumal, no doubt from the words *Mens Humana* occurring in the first line of the Latin version. A comparison of these four custumals shews

(1) 5 E. & B. 913.

NORTH, J. 1885 JOHNSTONE v. EARL SPENCER.

that no one of them is exhaustive, or contains everything found in any of the other three, and they do not agree in all respects when entries relating to the same matters occur in more than one. The steward of the manor also proves that there are customs of the manor recorded in the Court rolls which are not found in any of these custumals. The English Custumal was not relied upon by the Plaintiffs, but it contains this record:—"Item: every customary tenant shall at his first entry pay a fine or a relief: that is to say, if he be an heir, to pay a relief, and if he be a purchaser, then to pay a fine." The third custumal is not much relied on. It appears to be a mere series of notes and memoranda, made from time to time, with little regard to dates or subjects; and the last entry found in it is only just begun. The fourth custumal also does not give one much assistance. The *Henry* VII. Custumal is much more important than any of the others. It is a more complete document, and its recitals shew that it was intended to set at rest certain variances and discords which had arisen with respect to ancient customs. At the same time it is clear that it does not mention every custom, and it is clear also from the recitals that the variances and discords related to "divers articles" concerning the ancient customs, as to which knowledge had become imperfect; and in my opinion it was intended to be not a complete record of all the customs of the manor, but an authoritative settlement of the points which had been in dispute. The important passage in that custumal is "The new purchaser of any customary land shall pay to the lord a fine for his first admission, and for having his entrance at the pleasure of the lord, because he was not a tenant before. And afterwards the same tenant shall not make nor pay any fine for the like admission, because before he was a tenant; but shall give to the lord for each virgate of land for relief in the name of fine 2*s.* 2*d.*" Now this custumal is clearly admissible in evidence. See *Denn* v. *Spray* (1); *Roe* v. *Parker* (2); *Chapman* v. *Cowlan* (3); *Duke of Portland* v. *Hill* (4); and it is a strong piece of evidence so far as it goes, and as none of the other custumals are more explicit than this, so far as relates to the questions arising in

(1) 1 T. R. 466.
(2) 5 T. R. 26.
(3) 13 East, 10.
(4) Law Rep. 2 Eq. 765.

this case, and are all, as I have pointed out, of less weight and apparently of later date than that of *Henry* VII., dated in 1498, it will not be necessary to refer to them further. The Plaintiffs' counsel also tendered in evidence a certain survey of the manor, preserved among the records belonging to the Augmentation Office at *Westminster*, made previously to the sale of the estates of Queen *Henrietta Maria* (of which the manor of *Wimbledon* formed part), by Commissioners appointed by Parliament for the purpose by virtue of an Act of the Commonwealth. The Defendant's counsel objected to the admissibility of this survey. Before deciding this point I desired to see the Act under which the Commissioners were appointed; but before it was produced counsel agreed that the extract from that survey set out in the statement of claim should, but that no other part of that survey should, be treated as evidence. It does not seem to me to help the Plaintiffs. It goes no further than the custumal of *Henry* VII. The Plaintiffs also tendered in evidence two records of customs entered on the Court rolls in the years 1798 and 1809 respectively, which are also set out in the statement of claim, but they are both of recent date and do not carry the Plaintiffs' case further than the custumal of *Henry* VII. The only other evidence put forward by the Plaintiffs were the entries in the Court rolls in *Godrigg's Case* (1), and *Ustewayt's Case* (2). [His Lordship stated the details of these two cases and continued: —] It will be observed that in neither *Godrigg's Case* nor *Ustewayt's Case* was there any severance or splitting of admittances in respect of different tenements previously included in one disposition: as in each case the surrenders upon which the separate admittances followed were themselves separate. It is not disputed that these admittances and fines were perfectly regular, and according to the custom of the manor, but they are quite consistent with the Defendant's case.

The Defendant maintains:—1. That it is incumbent upon the Plaintiffs to prove that a special custom exists entitling them to split their admittances, and that they have not proved any such custom; but if the burthen of proof that there is no such custom is held to fall upon the Defendant, then his counsel contend— 2. That the Court rolls of the manor shew a uniform practice

(1) 19 Edw. 4, 1479. (2) 12 Hen. 7, 1496.

NORTH, J.
1885
JOHNSTONE v. EARL SPENCER.

that a purchaser who is not already a tenant, is on his first admission admitted to, and pays a fine or fines in respect of, all the tenements to which he is entitled under the disposition in pursuance of which he requires admittance; and that this practice, proved to have existed as far back as the Court rolls go, and before the date of the earliest extant custumal, either establishes a special custom to that effect, or proves what was the construction put from the earliest times upon the admitted custom as to a purchaser paying a fine on his first admission, and shews what a first admission under that custom meant. The Court rolls have been very carefully examined, and it appears that upwards of 630 instances have been found in which persons have been admitted under limitations to take effect on death, or death uses, as they have been called. In a large number of these cases the death uses have applied to more than one tenement: and for the purpose of grouping the results of such examination with respect to this usage or custom, Mr. *Davey* enunciated three propositions which he undertook to prove from the Court rolls. They were as follows:—1. That devisees, or surrenderees, to death uses are admitted at one Court to all the premises comprised in the same instrument, and devised or surrendered to the same uses. 2. That a single fine is paid on these admittances in respect of all the tenements in the admittance. 3. That it is contrary to usage for a person to be admitted to part of the premises comprised in such disposition, and then to be admitted to the remainder without fine as an existing tenant. In support of these propositions Mr. *Davey* referred fully to a large number of instances in the Court rolls. I shall refer to some of them only, and that very briefly. They are all cases of death uses. [His Lordship then quoted in detail various instances extending from the year 1489 down to the year 1869, and continued:—] The Court rolls furnish very numerous other instances in which persons have been admitted at one time under death uses to numerous tenements, and paid one fine in each instance, many of such fines being very large. It is not necessary for me to go into further detail, but I may mention in passing that in the year 1814 the first Lord *Ellenborough* purchased a copyhold consisting apparently (from the fact that four separate rents are reserved), of four tenements, and paid one fine of £850 upon his

admittance thereto. Under his will the same property was devised to his eldest son, who was admitted thereto in 1819, and paid one fine for the whole of £1000. The Court rolls do therefore contain a large body of evidence in support of Mr. *Davey's* propositions: and the next question is whether there are any and what other instances which are not consistent with them. In the whole range of the Court rolls only three cases are found which in any way apparently conflict with the first proposition. [His Lordship stated the particulars of two of these exceptions, and continued:—] It is not clear whether in these two cases the properties which were the subject of the separate admittances formed parts only of one tenement or not. If not, the cases are not really exceptions to the first proposition. If they were separate tenements, then the exceptions were merely nominal: for full fines on the whole property were paid in each case, and, as I have already pointed out, the material question in these cases always is what fine is to be paid; that point settled, the times of admittance are unimportant. In neither of these cases was the fine omitted on the second occasion upon the ground that the person admitted was already a tenant. And it seems to me very probable that in each case the second admittance was merely the correction of a slip or mistake. The third exception is *Coleman's Case*, who, in April and October, 1856, was admitted to separate parts of property which he took under one disposition: but as he paid no fine on either admittance, because he was tenant before, the fact of there being two admittances at different times is unimportant. Doubtless it was arranged for some reason to meet *Coleman's* convenience. To the second proposition eleven apparent exceptions are found. [His Lordship quoted them in detail, pointing out that most, if not all, of them were susceptible of explanation, and that several of them were evidently a matter of arrangement between the lord and the tenant, and continued:—] In no one of these eleven cases was the person admitted relieved from payment of the fine on the second admittance upon the ground that he was tenant before. In every one of them the lord was paid his full fine in respect of all the tenements comprised in the admittances, except where he agreed expressly to accept a smaller sum. None of them, therefore, in any way support the

NORTH, J. 1885 JOHNSTONE v. EARL SPENCER.

Plaintiffs' contention. In every case except two there is a clear explanation on special grounds, very probable, if not certain. With respect to those two cases also the lord was in no way prejudiced, and I think it very probable that they also were the subject of arrangement. Doubtless they were susceptible of easy explanation at the time. The earlier of them was in 1787, only 100 years ago; and for 300 years before, viz. from 1487, and ever since, with these two exceptions, the admittances on the Court rolls have been regular and uniform. Under no circumstances could two recent exceptional cases have any weight as opposed to the general current of admittances: see *Evelyn* v. *Worsfold*, and *Lord Gerard's Case* (1). With regard to Mr. *Davey's* third proposition, no exception to it can be found upon the Court rolls; and what the Plaintiffs desire is to introduce a first exception.

The question remains, whether the Plaintiffs have made out a right to the relief they ask? If they are right, and the fines paid upon admittance to several tenements under one disposition have in every case for 400 years been excessive, and contrary to the custom, and therefore illegally demanded and wrongly paid, it is not too late for the Plaintiffs to have redress, so far as they are concerned, even at the eleventh hour and fifty-ninth minute. But not one single instance has been found in the Court rolls in which that has been done which the Plaintiffs ask me to decide that they are entitled to do: and no such claim as the Plaintiffs now make has been made in the time, or to the knowledge, of the present steward, nor can a trace of such a claim at any time be found. If the Plaintiffs are right, why has not the view they contend for been acted upon in numerous cases? Why did *White* (2), for instance, in the year 1501, pay £13 6*s.* 8*d.* for admission to twenty-two tenements? and why did the *Juxons* (2), in 1626, pay fines amounting in the aggregate to upwards of £250 for a large number of tenements? and why did *Pettyward* (2), in 1749, pay one fine of £1400 for a like admittance?—if in each case they might have been admitted first to one tenement, for which a small fine was payable, and afterwards to all the rest without payment of any fine at all. *White's Case* is noticeable,

(1) Godbolt, p. 265, case 365.

(2) Cases cited from the Court rolls by Mr. *Davey* in support of his three propositions.

because it took place immediately after the date of the *Henry* VII. Custumal; and the *Juxons' Case* is noticeable, because their advisers (they themselves being infants) seem to have been quite awake to the point that, if and so far as the admittance could be split, the amount payable for fines would be diminished. I cannot believe that what has been done for so many years was mere mistake, by parties ignorant of their rights; or that such large payments would have been made in successive generations without objection unless the payments had been, to the knowledge of the tenants, according to the custom of the manor. If such a claim ever had been made, some record of it would probably have appeared on the Court rolls, where notes are found of many acts done contrary to the customs, and penalties enforced therefor: and if it was made and rejected, the case is still stronger against the Plaintiffs. It was suggested in reply that these fines were only got from purchasers who were not tenants, and who therefore were ignorant of the customs: and that persons who were already tenants did not pay them. But what is here suggested would be a gross fraud; and I see no ground upon which I can come to the conclusion that such payments were fraudulent even in their inception. Moreover, the purchasers must often have been advised and represented by persons thoroughly conversant with the customs of the manor, as we know was the case with the infant *Juxons*. And further, the suitors at the customary courts were themselves all owners of copyhold property, the value of which on any subsequent disposition would be impaired if claims by the lord to larger fines than the customs warranted were insisted on and acquiesced in. And I can come to no other conclusion than that the course of admittance and payment of fines which has so long existed is in accordance with the law. It is immaterial whether it is a special custom of the manor, strictly so called, or whether it is a usage of the manor, putting a construction upon the custom expressly contained in the custumals, except with reference to the argument urged on behalf of the Plaintiffs that it cannot be a special custom, because it is not found in any custumal—in support of which see the cases of *Marquis of Anglesey* v. *Lord Hatherton* (1) and *Duke of Portland* v. *Hill* (2). It is said

(1) 10 M. & W. 218.

(2) Law Rep. 2 Eq. 765.

NORTH, J. 1885 JOHNSTONE v. EARL SPENCER.

that if there were any such custom as alleged, it would certainly have found its way into some custumal. However forcible this argument would be, if there were any complete customary, it is of infinitely less weight when it is remembered that there is not any such thing as an exhaustive custumal, and that the custumal of *Henry* VII. does not profess to be a consolidated edition of all the customs of the manor, but rather a settlement of differences which had been stirred up as to "divers articles" concerning the customs. Moreover, there is nothing in the custumal to negative, or which is inconsistent with, the alleged special custom which might be written into the custumal immediately after the article I have quoted in full, and it would not be in any way contradictory to any of the articles already there.

Under these circumstances I come to the conclusion that there has been a course of practice in the manor of *Wimbledon* with respect to the mode of taking admittances in the case of dispositions to death user so long continued, so clear, and so uniform, as to be abundant evidence of such a special custom as the Defendant alleges; and looking at the number of such instances which occurred very soon after the date of the Custumal of *Henry* VII., in the same form as those which had shortly preceded it, I am satisfied that no one believed at the time that such admittances were in any way at variance with the customs of the manor or the rights of the copyholders. If such practice had been admittedly at variance with the customs of the manor, I cannot doubt that when discovered it would have been discontinued. If any variances or discords had been stirred up on the subject (to use the language of the custumal), I feel assured that when the books of old rentals, customaries, and Court rolls were diligently examined and inspected after mature deliberation, and when the points were looked up with respect to which knowledge had become imperfect, the premises would have been reformed, and the differences adjusted, and a full record thereof entered in the custumal. As neither of these events occurred, I can only come to the conclusion that there was nothing to reform in this respect, and that the practice then in vogue was correct, and in accordance with the custom shewn by these earlier documents. It is impossible for me to alter the footing upon which copyholds have been bought,

sold, and settled in this manor for hundreds of years without its being made clear that what has been done is contrary to law; and the Plaintiffs' contention to that effect is, in my opinion, not well founded. The Plaintiffs' experiment to reduce the fines they have to pay having failed, the action must be dismissed with costs.

Solicitors for the Plaintiffs: *Janson, Cobb, Pearson, & Co.*
Solicitor for the Defendant: *J. Plaskitt.*

H. L. F.

PEARSON, J.
1885
June 5, 8, 9.

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY.

SMALLPAGE'S AND BRANDON'S CASES.

Conflict of Law—Bill of Exchange—Foreign Indorsement—Company—Winding-up—Liquidator—Costs.

Bills of exchange were drawn in *France* by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in *England*:

Held, that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law.

Costs of successful claims in a winding-up were not given against the liquidator personally, but out of the assets.

THIS was the hearing of two summonses in the winding-up of the *Marseilles Extension Railway and Land Company*, a limited company, with its registered office in *London*. One summons was taken out on the part of *John Henry Smallpage* that he might be certified to be a creditor of the *Marseilles Extension Railway and Land Company* in respect of two bills of exchange for £2000 and £3000 respectively accepted by the company. The other summons was taken out on the part of Messrs. *G. S. & H. Brandon* that they might be admitted creditors of that company in respect of five bills of exchange of the aggregate amount of £12,000 accepted by the company.

All seven bills of exchange were drawn in duplicate at *Marseilles* by *E. Barry*, a domiciled Frenchman; they were similar except as to the amounts. The following is a copy of the first of exchange of one of the bills:—

"*Marseille, le premier Octobre* 1866. *B. P.* £2000.

"*A quatre-vingt-dix jours de date, payer par cette première de change à l'ordre de moi-même, la deuxième ne l'étant la somme de quinze cents livres sterlings,*

"*Valeur reçue,* *E. Barry.*"

"*Marseilles Extension Railway and Land Company, Limited, à Londres.*

"No. 144."

The first of exchange of each bill bore an English adhesive stamp, the second a French impressed stamp.

The bills were indorsed by *Barry* to the order of *H. D. Jenken*, an Englishman domiciled in *London*, and were during their currency negotiated with one *John Thomas Dobson* for value. They were indorsed by both *Jenken* and *Dobson*. When due the bills were presented and dishonoured. The applicants had obtained the bills from *Dobson*. Messrs. *Brandon* had received two of the bills before they were due, all the others were received by the holders when over due.

In April, 1867, a resolution to wind up the company voluntarily was passed, and on the 26th of that month an order was made to continue the winding-up under the supervision of the Court.

The bills in question, together with other bills to the amount of £20,000 in all, were renewals of bills drawn by *Barry* to provide for part of the price of certain land he had contracted to sell to the company. There was evidence on the part of the liquidator to shew that the contract for the sale of the land had not been carried out, and that as between *Barry* and the company the company had a right to refuse payment of the bills. A defence to the summons was that according to French law (*Code de Commerce*, arts. 137, 138) the indorsement of the bills was informal, and inoperative to make the bills negotiable, and that they were in the hands of every holder subject to the equities between the company and *Barry*.

Higgins, Q.C., and *Levett*, for *Smallpage*; and *Cookson*, Q.C., and *Grosvenor Woods* for Messrs. *Brandon*:—

The bills were to all intents and purposes English bills, intended to be paid in *England*; and for all purposes, including the mode of indorsement, were to be governed by English law; at all events as against the acceptors, who contracted in *England*. It would be of the utmost inconvenience, and prevent the negotiability of any bills, indorsed abroad, if the burden were cast on the holder of seeing that all the formalities required by the laws of the several places of indorsement had been complied with: *Lloyd* v. *Guibert* (1); *Lebel* v. *Tucker* (2); *Trimbey* v.

(1) Law Rep. 1 Q. B. 115. (2) Law Rep. 3 Q. B. 77.

PEARSON, J. 1885 SMALLPAGE'S AND BRANDON'S CASES.

Vignier (1); *Allen* v. *Kemble* (2); *Hirschfeld* v. *Smith* (3); *Bradlaugh* v. *De Rin* (4); *Rothschild* v. *Currie* (5); *Rouquette* v. *Overmann* (6); *Foote* on Private International Law (7); *Story* on the Conflict of Laws (8).

In case the claims are allowed the liquidator, who has chosen to contest them, ought to be ordered to pay the costs, getting them back from the estate, if he can, in accordance with the rule laid down by the Court of Appeal in *Farrao's Case* (9).

A similar rule prevails in bankruptcy: *Ex parte Angerstein* (10); *Pitts* v. *La Fontaine* (11).

Everitt, Q.C., and *H. B. Buckley*, for the liquidator:—

According to the law of *France*, the indorsement of *Barry* was only a procuration, and did not make the bills negotiable; it left them subject in every person's hands to the equities between the acceptors and *Barry*. The effect of the indorsement is for all purposes, in *England* as well as in *France*, to be determined by the law of *France*, the place where the bills were drawn, and the indorsement made by a domiciled Frenchman. If the contrary were held, the absurdity would arise that on the same bills actions might be brought by different parties: *Rothschild* v. *Currie*; *Rouquette* v. *Overmann*; *Bradlaugh* v. *De Rin*; *Trimbey* v. *Vignier*; *Story* on the Conflict of Laws (12).

The rule as to the costs of an unsuccessful appeal by a liquidator, who has already had the decision of the Court against him, does not apply to a claim resisted in the Court below, or proceedings taken by him to save the assets of the company: *Ex parte Bentley* (13).

The liquidator is not the real party to the proceedings, whether taken in his name or in that of the company. The real party is the company, and the company's assets are alone responsible for costs: *Ex parte Kintrea* (14).

(1) 1 Bing. N. C. 151.
(2) 6 Moo. P. C. 314.
(3) Law Rep. 1 C. P. 340.
(4) Ibid. 3 C. P. 538; Ibid. 5 C. P. 473.
(5) 1 Q. B. 43.
(6) Law Rep. 10 Q. B. 525.
(7) Page 350.
(8) 8th Ed. s. 314, p. 438.
(9) Law Rep. 9 Ch. 355, 358.
(10) Ibid. 479.
(11) 6 App. Cas. 482.
(12) 8th Ed. s. 316 b, p. 445.
(13) 12 Ch. D. 850.
(14) Law Rep. 5 Ch. 95.

The liquidator is only doing his duty in resisting these claims. It would be impossible for a liquidation to be properly carried out if each contested step was to be taken at the risk of personal liability.

Higgins and *Cookson*, in reply.

June 9. PEARSON, J.:—

The first objection taken to these bills was this, that being indorsed by M. *Barry* in *France* the indorsement by M. *Barry* in *France* did not comply with the laws of *France*, and with the 137th section of the *Code de Commerce*, and that inasmuch as that was informal the acceptors in this country are not liable, because the person who takes the bills and holds the bills at the present moment takes them through a person who derived them by means of this informal indorsement, and there is therefore no good title shewn to them in the hands of the present holder.

The first answer that is made to that is this: You, the acceptors, are an English company, you accepted the bills payable in *England*, the contract of acceptance therefore is an English contract, and all that it is necessary to shew is that there is an indorsement which is good according to the law of *England*; therefore as against you if there be such an indorsement there is no need whatever to trouble ourselves with the law of *France*.

Against this it is said, and with great force, that although the drawer of this bill was a Frenchman and the bill was drawn in *France*, nevertheless as against the acceptor the bill is an English bill, and it is not necessary to look at all to the formalities of the French law. On the other hand it is urged by the acceptors,—although we are liable, according to the English law, upon our English contract of acceptance in *England*, nevertheless an indorsement made upon the bill drawn by a French drawer, must be in conformity with the law of *France*, otherwise there is no good indorsement at all. If I had to decide the question as to whether or not where a bill is indorsed in different countries the indorsement must be in every case in conformity with the law of the

PEARSON, J. 1885 SMALLPAGE'S AND BRANDON'S CASES.

country in which the indorsement takes place, I should certainly take time to consider before I came to the conclusion that that was the law. But, for the reasons I am about to give, I think it absolutely immaterial in the present case to decide that point, because, when I come to look at this bill, I find that the bill though drawn in the French language, drawn by M. *Barry* in *Marseilles*, is in all other respects an English bill of exchange. It speaks of English current money and not of French current money, and it is drawn in a form which according to the French law would make the bill itself an invalid bill.

Before therefore I could determine that this was to be considered a French bill, as regards the drawer of the bill, I should have to come to the conclusion that at the time when this bill was drawn it was an invalid bill altogether, and to do so would be, to my mind to decide that which would be, on the face of it, manifestly absurd. This is a bill purporting to be, on the face of it, in all respects drawn as an English bill, not drawn in the French form though in the French language, drawn according to the common form in *England*, *valeur reçu*—that is value received—and perfectly good according to the law of *England*, though invalid according to the law of *France*, and I come therefore to the conclusion that this was intended to be, although expressed in the French language, an English bill of exchange for all purposes, at all events as regards the acceptors of the bill; and that it is not possible for the acceptors of the bill to say that this is a French bill drawn in *France*, and that, so far as regards the drawer, it must be considered therefore as a French bill.

In one of the cases that was cited, *Trimbey* v. *Vignier* (1), where the same question arose, there was an opinion given by the French advocate, M. *Schonda*, upon which I should be exceedingly pleased to act if I properly could. The opinion of the French advocate simply proved to the Court at that time, as evidence in that case, what the French law was, as a matter of fact, and I cannot import into this case the evidence given in another case which has not been given in the present case. M. *Schonda* gives an interpretation of this article of the *Code de Commerce*

(1) 1 Bing. N. C. 151.

which to my mind is exceedingly intelligible, and which I should be very glad to adopt as the rule of law in this case. He says that when there is an informality of this kind in the indorsement of a bill of exchange, that informality may be pleaded as between the person who has made the indorsement and the person who is claiming under the indorsement, but that it cannot be set up as between the indorsee and the acceptor. But in the present case, as I have said, it is not necessary for me to decide that that is the rule which ought to be laid down. I hold that as between the drawer, and therefore as between his indorsee and the acceptors, this was intended to be, and to be treated as, an English bill of exchange, and that being so, the indorsement which M. *Barry* made was, to all intents and purposes, a good indorsement. Upon the evidence of the French experts before me, I should have very great difficulty in saying what the law of *France* was with regard to the indorsement, but I think I should come to the conclusion, upon the evidence in this case (so far as I have heard it), that the indorsement made the bills negotiable according to the law of *France*. Whether that was so or not, I hold that this bill, at all events, was properly indorsed by M. *Barry* by merely writing his name across it in the ordinary way in which a bill would be indorsed in this country, and that, as between M. *Barry* and all persons claiming under him, so far as the indorsement goes, it was a good indorsement, and the acceptors therefore could raise no objection to it.

I am glad to be able to come to that conclusion, because it relieves me from that which certainly would have been a very serious difficulty, that of determining upon the decided cases in these Courts, as well as upon the French law, what is the result of an indorsement (which is informal as regards the person who makes it) with regard to those who claim, not against that person, but who claim against the acceptors. To my mind there is exceeding difficulty in determining that the indorsement is to be valid for any purpose in this country, and yet that objection may be taken to it, and that the acceptor is at liberty to say, I am entitled in this country, although for some purposes the indorsement is treated as good, to take advantage of any equities that there may be between myself and the drawer of the bill as against

PEARSON, J. 1885 SMALLPAGE'S AND BRANDON'S CASES.

an indorsee or holder for value who sues upon the acceptance. I am not bound, I am happy to say, to go into that question at all. I feel very strongly the observations of the late Mr. Justice *Willes* in the case of *Bradlaugh* v. *De Rin* (1), in which he points out that it is hardly possible to conceive a state of the law in this country in which there should be two persons able to sue at the same time on the same bill, one as the agent, and the other as the holder of the bill.

However, the facts being as they are, I come to the conclusion, and I so decide, that the indorsement of this bill is a good indorsement, and that the acceptors are liable, so far as the indorsement goes, to be sued and are bound to pay upon the bill if they have no other objection.

With regard to the costs, of course the applicants must have their costs. But in giving them I treat the company as if they were the Respondents, and give the costs against the company. I am asked to make the liquidator personally pay costs and leave him to get them out of the assets of the company if he can. If the practice of the Court shall be changed, and I am told by the Court of Appeal that all liquidators who resist any claim are to be made personally responsible for costs, I shall bow to the authority, as I shall bow to any other decision that may be made by a superior Court. But as far as I know the practice, the practice has not been to make the liquidator liable. And I conceive that it might render it almost impossible to wind up any company if such a practice were to be established, because the result would be, that except in cases where the assets were very large indeed, no liquidator would choose to resist a claim brought against a company, without the authority of the Judge, and without being indemnified from all personal liability for costs in case of the claim being successful. I cannot imagine how any Judge at Chambers is to deal with an application for such authority, and tell the liquidator whether he is to resist a claim or whether he is to bring forward a claim, or to determine before a claim is argued whether or not the liquidator ought or ought not to be indemnified. It seems to me that such a practice would simply tie up all proceedings in Chambers, and make all windings-up in this

(1) Law Rep. 3 C. P. 543.

Court absolutely impossible. In one view it may be thought it might be desirable that that should be so; but until windings-up are stopped, and as long as they are going on, I think the only reasonable way they should go on is this, that the liquidator should be considered to represent the company, and that the costs should be given in the same way in which they would be given if the company were defendants, leaving the Court the authority which it now possesses in all proper cases if the liquidator disregards his duty, and throws upon the parties costs which he ought not to throw upon them, to make the liquidator personally responsible for such dereliction of his duty.

The costs in this case will come out of the assets of the company.

Solicitors: *Mercer & Mercer; G. S. & H. Brandon; C. & S. Harrison & Co.*

D. P.

In re ATKINSON.
ATKINSON *v.* BRUCE.

[1885 A. 473.]

PEARSON, J.
1885
June 25.

Settled Land—Tenant for Life—Persons having Powers of Tenant for Life—Discretionary Trust for Application of Income during Life—Forfeiture in Event of Bankruptcy—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 6, 10, *cl.* i., 51, 58, *sub-s.* 1, *cls.* vi. ix.

The words "entitled to possession of settled land for his life," as used in sub-sect. 5 of sect. 2 of the *Settled Land Act*, 1882, means entitled "in possession" as distinguished from entitled "in reversion," and the words in sub-sect. 6, "two or more persons so entitled as tenants in common, or as joint tenants," mean entitled "for life."

A testator devised real estate to the use of trustees in fee during the life of his son, on trust to receive the rents, and, after payment of costs and outgoings, to hold the residue of the rents upon the trusts hereinafter mentioned. And after the death of the son, to the use of his first and other sons successively in tail male, with remainders over. And the testator directed that his trustees should during the life of the son pay and apply the residue of the rents which should during his life become payable to them in such manner in all respects as they should think best for the maintenance, or otherwise for the benefit of the son and of his wife and his child or children, or for the benefit of any one or more of them, and so

PEARSON, J.

1885

In re ATKINSON.

ATKINSON *v.* BRUCE.

that, in case the son should at any time assign, charge, or attempt to anticipate his interest under the will, or should do any act whereby, either directly or by operation of law, he would, if absolutely entitled to such interest, be deprived, or liable to be deprived, of the benefit or enjoyment thereof, then the trust thereinbefore declared in his favour should absolutely cease, and the rents should thenceforth during his life be applied by the trustees, either for the maintenance, support, or benefit of the son, or for such other purposes and in such manner in all respects as the trustees should in their absolute discretion think fit. There being no children of the son and he not having forfeited his interest under the will:—

Held, that he and his wife did not together constitute a tenant for life of the estate by virtue of sub-sect. 6 of sect. 2 of the *Settled Land Act*, 1882, and that they had not, by virtue of sect. 58, the powers of a tenant for life under the Act.

THIS was an action by originating summons by *J. E. Atkinson* and his wife, as Plaintiffs, against *T. D. Bruce* and *A. C. Bruce* as Defendants (entitled also in the matter of the *Settled Land Act*, 1882), asking for the directions of the Court (1) whether the Plaintiff, *J. E. Atkinson*, and his wife and their children (if any) were entitled to the rents and profits of an estate, called the *High Trewhitt* estate, devised by the will of *Adam Atkinson*, deceased; (2), whether the Plaintiff, *J. E. Atkinson*, and his wife and children (if any) had the power of a tenant for life under the Act.

The Defendants were the trustees of the will.

Adam Atkinson, by his will, dated the 26th of May, 1875, devised an estate, called the *High Trewhitt* estate, to the use of trustees, their heirs and assigns, during the life of his son, the Plaintiff, *J. E. Atkinson*, upon trust to receive the rents and profits thereof, and to repair, improve, and manage the same, and after payment of all costs and outgoings incurred in relation to the same, and of the interest of any mortgages then affecting the same, to hold the residue of the rents and profits upon the trusts thereinafter mentioned, and, from and immediately after the death of *J. E. Atkinson* to the use of his first and other sons successively in tail male, with remainders over. And the testator declared that his trustees should during the life of *J. E. Atkinson* pay and apply the clear residue of any rents and profits of the hereditaments thereinbefore devised which, under the trusts thereinbefore contained should, during the life of *J. E. Atkinson*,

become payable to the trustees, in such manner in all respects as they should think best for or towards the maintenance and support, or otherwise for the benefit, of *J. E. Atkinson*, and of any wife with whom he might intermarry, and his child or children by her, or for the benefit of any one or more of such objects, and so that in case *J. E. Atkinson* should at any time assign, anticipate, or charge, or attempt to anticipate, his interest under the will, or any part thereof, or should do any act whereby, either directly or by operation of law, he would, if absolutely entitled to such interest, be deprived or liable to be deprived of the benefit or enjoyment thereof, then and immediately thereupon the trust thereinbefore declared in favour of *J. E. Atkinson* should absolutely cease and determine, and the said rents and profits should thenceforth during his life be applied by the trustees either for the maintenance and support or benefit of *J. E. Atkinson*, or for such other purposes and in such manner in all respects as the trustees should in their absolute discretion think fit.

The testator died on the 6th of June, 1875.

J. E. Atkinson had married, but he had no children. He had done nothing to forfeit his interest under the will.

Cookson, Q.C., and *Mulligan*, for the Plaintiffs:—

The Plaintiffs and their children (if any) are entitled to receive the rents of the estate. They are therefore beneficially "entitled to possession" (as distinguished from reversion) "of settled land" for the life of the son, and together constitute the tenant for life for the purposes of the *Settled Land Act*, sect. 2, sub-sects. 5, 6, and 10, cl. i. (1). At any rate the Plaintiffs have, under sect. 58 (2),

(1) Sect. 2, sub-sect. 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Sub-sect. 6. "If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act."

Sub-sect. 10. In this Act—

"(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income."

(2) Sect. 58, sub-sect. 1: "Each person as follows shall, when the estate or interest of them is in possession, have the powers of a tenant for life

PEARSON, J. 1885 *In re* ATKINSON. ATKINSON *v.* BRUCE.

sub-sect. 1, clause (i.) or clause (ix.), the powers of a tenant for life under the Act, and can sell the estate. And sect. 51 (1) shews that no attempted restriction of the powers of a tenant for life contained in the settlement will be of any avail. The power given to the trustees in the present case to select which of a class of persons shall receive the rents will not prevent the whole class from exercising the powers of a tenant for life.

In *In re Morgan* (2) estates were devised to trustees on trust to pay the net rents to the testator's widow for the maintenance, education, and benefit of his son until he should attain twenty-one, and without being liable to account to the trustees or the son, and upon his attaining twenty-one on trust for him absolutely; but, if he should die under twenty-one without leaving

---

under this Act, as if each of them were a tenant for life as defined in this Act (namely) (*inter alios*):

"(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

"(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

(1) Sect. 51, sub-sect. 1: "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act, a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

Sub-sect. 2. "For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same."

(2) 24 Ch. D. 114.

issue, then on trust for the wife for her life if she should continue a widow, and, after her death or second marriage, on other trusts, and it was held that the infant son had the powers of a tenant for life under the Act.

"Possession" refers to an immediate right as distinguished from a right in reversion or expectancy; the equitable right to the income is enough: *In re Morgan* (1); *In re Jones* (2).

W. W. Karslake, Q.C., and *Dunham*, for the trustees:—

Neither the Plaintiffs nor their children (if any), nor all of them together, are entitled to the rents of the estate; the trustees can apply them as they think fit for the benefit of any one or more of them. No one of them can demand from the trustees the payment of any specific sum. There is no right to "possession." The trust may be carried out without the payment of any money to any of the persons named as objects of the trust; the trustees have an unlimited discretion: *Chambers* v. *Smith* (3).

[PEARSON, J.:—If the clause of forfeiture in the event of bankruptcy is valid, the trustees can in that event apply the income in any way they please; have I, then, all the concurrent interests during the life of the son before me?

Coolson, Q.C.:—It is sufficient if the tenant for life for the time being is here.]

Neither of the objects of the trust takes any actual interest; everything is in the discretion of the trustees: *Holmes* v. *Penney* (4). The husband is not a tenant for life within sect. 2, sub-sect. 5, nor do the husband and wife, or they and their children together, constitute a tenant for life under sect. 2, sub-sect. 6. Sect. 58, sub-sect. 1 (cls. vi., ix.) does not apply. There is no trust or direction for payment of the income to them or any of them during any life. Sect. 2, sub-sect. 6, is the only provision in the Act for a divided tenancy for life, and the Plaintiffs are not "so entitled," *i. e.*, "beneficially entitled to possession of settled land for life" within the sub-section. There is no one now entitled to possession of settled land: *In re Hazle's Settled Estates* (5). Sect. 51

(1) 24 Ch. D. 114.
(2) 26 Ch. D. 736.
(3) 3 App. Cas. 795.
(4) 3 K. & J. 90, 98.
(5) 29 Ch. D. 78.

PEARSON,J. 1885 *In re* ATKINSON. ATKINSON *v.* BRUCE.

applies only where there is a tenant for life. There is no tenant for life in the present case.

Cookson, in reply:—

The husband and wife together are at the present moment entitled to the interest of the rent of the settled land.

[PEARSON, J.:—Are they entitled for any life? If children were born the rents might be applied by the trustees for their benefit.]

It is sufficient that all the concurrent interests for the time being are before the Court. The words "so entitled" in sect. 2, sub-sect. 6, mean "entitled for the time being." There being no children now in existence, the possible interests of children may be neglected. Under sect. 58, sub-sect. 1 (cl. vi.), a person who has an interest only until his bankruptcy, or whose life estate is liable to be defeated by the happening of some other contingency, has, when his estate is in possession, the powers of a tenant for life. *Holmes* v. *Penney* (1) was only a decision that the tenant had had no interest which passed to his assignee. Here there has been no bankruptcy. What can the trustees do with the income but apply it from time to time for the benefit of the husband and wife? There is no provision for accumulation of the surplus. *Chambers* v. *Smith* (2) turns on the absolute power of the trustee to withhold the payment of either principal or interest from the legatee. It is enough that the husband has a present right to receive the rents. So long as there are no children the husband and wife together have an estate for the life of the husband. *In re Hazle's Settled Estates* (3) was quite a different case.

PEARSON, J.:—

The question raised in this case is no doubt a difficult one, depending as it does upon the construction of some sections of the *Settled Land Act*, 1882, which, so far as I know, have never been construed before, and have to be construed for the first time with reference to the particular circumstances of this case. [His

(1) 3 K. & J. 90. (2) 3 App. Cas. 795.
(3) 29 Ch. D. 78.

Lordship stated the facts, and continued:—] The question is whether under these circumstances *J. E. Atkinson* and his wife together constitute the tenant for life of the property within the meaning of the *Settled Land Act*, so as to be entitled to exercise the powers of the tenant for life under the Act, and, if they please, to sell the estate. In my view this question depends on the construction of sub-sects. 5 and 6 of sect. 2 of the Act, and I do not think the construction is aided by sect. 51 or sect. 58. Sect. 51 only relieves the settlement of any prohibition against, or limitation of, the exercise of the powers conferred by that Act on a tenant for life, and I do not think there is anything in the present will which affects or limits in any way the exercise of those powers. And, as to sub-sect. 1 (cl. vi.) of sect. 58, in order that it may apply you must, to begin with, find that there is a person who is "tenant for his own or any other life, or for years determinable on life." And, in order that a person may come within sub-sect. 1 (cl. ix.) he must be "entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life." I do not think either of these clauses of sub-sect. 1 of sect. 58 applies to the present case. Either the case comes within sub-sects. 5 and 6 of sect. 2, or it is not within the Act at all.

The first question is, what interest have *J. E. Atkinson* and his wife independently of the Act? In my view of the construction of the will neither the husband nor the wife is a tenant during the life of the husband or for any other period. The trust is not to pay the rents to either of them, but to pay and apply them as the trustees should think best for the benefit of the son, and of the wife and his child or children, or for the benefit of any one or more of such objects, and if the son should become bankrupt the discretionary trust is wider still; the trustees may then apply the rents "for such other purposes and in such manner in all respects as they in their absolute discretion think fit." To my mind it would be absolutely impossible for either the husband or the wife, or their children, if they have any, or for all of them together during the husband's life to compel the trustees to pay the whole of the income to them. If the husband became bankrupt the trustees might apply the income for the benefit neither of the

PEARSON, J. husband nor of the wife, nor of the children, but for any purpose they pleased. I am at a loss to see how either the husband, or the wife, or the children, or all of them together, is or are a tenant for life under the provisions of the will. So the case stands independently of the Act.

1885

In re ATKINSON. ATKINSON *v.* BRUCE.

The next question is, whether, looking at the provisions of the Act, they or any of them are or is a tenant for life under the Act? I desire not to forget the observations made by Earl *Selborne*, L.C., with regard to the Act in *In re Hazle's Settled Estates* (1): "I do not think it was intended to enlarge or alter the substance of any original limitation of a particular estate (not properly an estate for life) which might be lawfully in force when the statute came into operation, and as to which the author of the settlement had neither contemplated nor in any manner provided against any such acts as those in question, nor indeed could rationally have done so, as the law stood when the settlement was made." I think, therefore, that though the Court is bound to give the Act a liberal interpretation to effect the purposes of the Act, it is not bound so to interpret it as to destroy the provisions of a settlement lawfully made before the Act came into operation. Now sub-sect. 5 of sect. 2 says that "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." I take it that the words "entitled to possession" in that sub-section mean entitled in possession as contradistinguished from reversion, and that it is immaterial whether there are or are not any surplus rents which the person entitled can in fact receive. If he is entitled for his life to the potentiality of receiving the rents he is the tenant for life within sub-sect. 5. Is there then in the present case any person now in existence who can be called the tenant for life within the meaning of sub-sect. 5? It is said that the husband and the wife are tenants for life. On the most favourable construction of the words they are only the persons now *in esse* who are entitled to the rents, but I am at a loss to see how they are entitled to them for life, either for their own lives respectively or for the life of the husband. At the

(1) 29 Ch. D. 84.

most they are entitled only until children of the marriage come into existence, in which case they would be no longer entitled to the rents. It might be that the whole of the rents would then be applied by the trustees for the benefit of the children. Then it is said that sub-sect. 6 of sect. 2 applies, and that it has the effect of constituting the husband and wife together "the tenant for life for the purposes of the Act." I read the words "so entitled" in sub-sect. 6 as meaning "entitled for life." I do not think that either the husband or the wife in the present case is "entitled for life," and therefore I think they cannot together make up "the tenant for life for the purposes of the Act." I cannot disregard the possible interests of children of the marriage, and if I could that would be of no avail if the husband and wife are not tenants for life. In my opinion the Plaintiffs are not entitled to exercise the powers conferred on a tenant for life by the Act. I think I should not be carrying out the policy of the Act, if I were to hold that there is a compound tenancy for life which might be used to defeat the lawful object of the settlement. I must, therefore, dismiss the summons.

Cookson asked for the costs out of the estate.

Karslake opposed.

PEARSON, J., gave the costs out of the rents. The costs of the Plaintiffs as between party and party; the costs of the trustees as between solicitor and client.

Solicitors for Plaintiffs: *Smiles, Binyon, & Ollard,* agents for *Welchman & Carrick, Wisbech.*

Solicitors for Trustees: *Crowdy, Son, & Tarry.*

W. L. C.

PEARSON, J.

1885

July 9.

SYER *v.* GLADSTONE.

[1872 S. 269.]

Will—Mortgage—Onerous Property—Devise of.

A testator devised and bequeathed a freehold house and the furniture and effects therein on trust for *A.* and *B.* for life. The house was subject to a mortgage for more than its value :—

Held, that *A.* and *B.* were entitled to the use of the furniture without keeping down the interest on the mortgage.

THIS was a suit for the administration of the estate of *Charles Bell*, deceased. He made a will dated September, 1867, by which he gave, devised, and bequeathed his messuage or dwelling-house, known by the name of *Terrace House, Richmond*, and all his household goods and furniture, plate, linen, china, articles of ornament and vertu (not being ornaments of the person or articles of jewelry), books, prints, and other household effects, which at the time of his decease should be in, upon, or about the same, to *Robert Gladstone* and *Henry Parkinson Sharp* (the Defendants to the suit), whom he appointed two of his executors, to permit his sisters, *Mary Bell* and *Maria Bell* (now Madame *de Valdrome*), during their joint lives, and the survivor of them during her life, to have the use and occupation of the said messuage or dwelling-house and premises, and the said furniture and other effects therein, or if the same should be let under the provisions hereinafter contained, to receive the rents and profits thereof, they and she keeping the same in an efficient state of substantial and decorative repair to the satisfaction of his trustees, and keeping the same messuage, furniture, and effects insured against loss or damage by fire, and after the decease of the survivor, the testator directed that the said house and furniture and effects should form part of his residuary estate. The testator also bequeathed an annuity to his sisters *Mary Bell* and Madame *de Valdrome*. The testator devised and bequeathed his residuary estate to the Defendants, whom he appointed two of his executors, on trust, subject to the payment of certain annuities, to accumulate the income during the lives of his sisters, *Mary Bell* and Madame *de*

Valdrome, and until the youngest for the time being of the five children of *Caroline Syer* (the Plaintiffs in the suit) should attain twenty-one, and stand possessed of his residuary estate, and the accumulations thereof on trust for such of the Plaintiffs as being a male or males should attain the age of twenty-one years, or being a female or females should attain that age or marry, and the issue of the Plaintiffs if they should be dead.

The testator, by an indenture of mortgage dated the 10th of January, 1867, conveyed the *Terrace House* to his sisters *Mary Bell* and *Maria Bell* to secure a sum of £10,000 advanced to him by them, and interest.

The testator died in February, 1869. His will was proved by the Defendants alone. They paid off the mortgage debt of £10,000, and the *Terrace House* was reconveyed to them. Miss *Bell* and Madame *de Valdrome* were then in possession of the *Terrace House*, they continued in possession till the 29th of September, 1880, when it was sold under the order of the Court in this suit for the sum of £9500. The furniture was also bought by the purchaser of the house, and Miss *Bell* and Madame *de Valdrome* were paid the income arising from the purchase-money of the furniture.

The suit now came on on further consideration and adjourned summons. A question raised on summons was whether the devisees of *Terrace House* for life were bound to make up to the testator's estate the excess of the interest of the mortgage debt over the rent of the house. The question was raised on summons taken out by the Plaintiffs in the suit for an order that *Mary Bell*, spinster, and *Maria de Valdrome*, widow, should pay into Court the sum of £698 15*s.*, being the amount due from them in lieu of interest on the mortgage existing at the testator's death upon *Terrace House, Richmond*, from the 1st of January, 1880, to the 1st of July, 1882, less £277 18*s.* 4*d.*, the amount in Court representing the income of the purchase-money of *Terrace House*.

Everitt, Q.C., and *Renshaw*, for the Plaintiffs in the suit:—

Where a person is given, by one clause in a will, beneficial property and property subject to a burden, he cannot take the beneficial property without also taking the burden: *Guthrie* v.

PEARSON, J. 1885 SYER v. GLADSTONE.

Walrond (1). Under that rule Miss *Bell* and Madame *de Valdrome* must keep down the interest on the mortgage debt during their lives.

Cozens-Hardy, Q.C., and *Buckley*, for Miss *Bell* and Madame *de Valdrome*.

Higgins, Q.C., and *Mulligan*, for the Defendants.

PEARSON, J.:—

There seems to me to be an absolute difference between the two things,—a devise of real property subject to a mortgage coupled with other property, and a gift in the same clause of several leaseholds, some of which are onerous and some profitable. If a man wishes to accept the leaseholds he must make himself liable to all the burdens of the leases. Under a gift of mortgaged property the devisee never became liable for the mortgage debt, and under the old law he would not only not have been not liable, but would have been entitled to have the mortgage debt paid out of the testator's estate. All that *Locke King's Act* does is, not to make him incur a personal liability, but to say that he shall not be able to call upon the testator's representatives to pay off the debt. If the interest were not kept down, the mortgagee would be entitled, if he pleased, to enforce his remedy by sale or foreclosure, and if the mortgaged property were insufficient, the mortgagee could not proceed against the devisee, but only against the estate of the testator. Under these circumstances I am of opinion that this does not come within the rule applying to a gift in the same sentence of onerous and beneficial property.

Solicitors: *Tattam; Wordsworth, Blake & Co.; Batten, Proffitt, & Scott.*

(1) 22 Ch. D. 573.

D. P.

PEARSON, J.

1885

July 14, 15.

In re WAIT.
WORKMAN *v.* PETGRAVE.

[1883 W. 966.]

Power—Exercise—Special Power—Exercise by Will—Intention.

If a testator manifests an intention to exercise by his will a special power of appointment, by reason of his making some gifts of property which he describes as "my" property, but the words of which gifts cannot be satisfied unless they pass property subject to the power, the Court will assume that he intended also to exercise the power in the case of other gifts in the will which are capable of passing other property subject to the power, although the words of gift can be satisfied by means of property belonging to the testator himself.

A testator had under a settlement a special power to appoint by will two estates at *B.* and at *S.* respectively, and also some shares in the *B. Colliery*. By his will he made gifts of "my estate at *B.*" and of "my estate at *S.*," and he made another gift of "all my share and interest in the *B.*, *H.*, and *W. Colliery Companies*." He had no property of his own at either *B.* or *S.*, but he had some shares of his own in the *B. Colliery*:—

Held, that the will operated as an exercise of the power, not only as regarded the estates at *B.* and *S.*, but also as regarded the settled shares in the *B. Colliery*.

THIS action was brought for the administration of the estate of *D. C. Wait*, who died on the 5th of December, 1881.

By a deed dated the 15th of January, 1845, *D. C. Wait* granted and assigned to trustees, their heirs, executors, administrators, and assigns, all that quarter part or share in the *Braysdown Coal Works*, devised and appointed to him by the will of *Ann Purnell Wait*, and also all that mansion-house and estate, farm and lands, called respectively *Belluton* and *Sideham*, situate respectively in the parishes of *Stanton-Drew* and *Pensford*, in the county of *Somerset*, to hold the said premises unto the trustees, their heirs, executors, administrators, and assigns respectively, to the use or in trust for the testator during his life, without impeachment of waste, and after his death to the use of or in trust for such one or more of the children or grandchildren of the testator as he should by deed or will appoint, and, in default of such appointment, then to the use of or in trust for all the children and grandchildren of the testator as therein mentioned, and, in case there should be

PEARSON, J. 1885 *In re* WAIT. WORKMAN *v.* PETGRAVE.

but one such child or grandchild, then to the use of or in trust for such one child or grandchild; but, in case there should be no such child or grandchild, then to certain other uses therein mentioned.

D. C. Wait made his will dated the 24th of March, 1879, and thereby gave and devised unto and to the use of his son *W. S. Wait*, his heirs and assigns, "all my freehold estate at *Belluton*, in the parish of *Stanton-Drew*," subject to the payment thereout of £200 to each of the testator's sons *J. P. Wait* and *R. E. L. Wait*. And the testator gave and devised unto and to the use of his son *J. P. Wait*, his heirs and assigns, "all my estate known as *Sideham*, in the parish of *Stanton-Drew*." And, after making some other specific devises of property described as recently purchased, the testator gave and bequeathed "all my share and interest in the *Braysdown*, *Huish*, and *Writhlington Colliery Companies* unto and equally between my three daughters, *Hester Braund*, *Ann Purnell Hopper*, and *Priscilla Purnell Workman*, as tenants in common, share and share alike." The will contained no reference to the power of appointment given to the testator by the settlement. By a codicil the testator, after stating that his daughter *Hester Braund* had died leaving three children her surviving, revoked all bequests and devises made to her, and he gave and bequeathed "one third part or share of all my shares and interest in the *Braysdown*, *Huish*, and *Writhlington Collieries*" unto and equally between the said three children of his late daughter *Hester Braund*.

At the date of his will and at the time of his death the testator had no property of his own answering to the description of *Belluton* and *Sideham*, and there was nothing upon which the gifts of those properties could operate, unless they operated as an exercise of the power of appointment given by the settlement. The testator had, however, a one-forty-eighth share in the *Braysdown Colliery Company* which was his own absolute property. He had also some shares in the *Huish* and *Writhlington Colliery Companies* which belonged to him absolutely.

In addition to the claim for administration of the estate, the Plaintiff, Mrs. *Priscilla Purnell Workman*, claimed, if and so far as might be necessary or expedient, to have the trusts of the

settlement carried into execution under the direction of the Court.

This was the further consideration of the action, and one of the questions was whether the will operated as an exercise of the power of appointment as regarded the one-fourth share in the *Braysdown Colliery* which was included in the settlement. It was admitted that the will did operate as an exercise of the power as regarded the *Belluton* and *Sideham* properties.

Cozens-Hardy, Q.C., and *E. Ford*, for the Plaintiff:—

The power of appointment has been exercised by the will as regards the settled share in the *Braysdown Colliery*, no less than as regards the *Belluton* and *Sideham* properties. The fair inference is that the testator intended to dispose of all the shares in that colliery of which he had power to dispose by will.

Everitt, Q.C., for one of the persons entitled in default of appointment:—

I do not dispute that the *Belluton* and *Sideham* properties pass by the will, there being no other properties but those comprised in the settlement which could satisfy the words of the will. But that is not the case with the shares in the colliery, as the testator had shares of his own which will satisfy the words of gift. The Court is not compelled to hold in that case that there was an intention to exercise the power. It is not a question of general intention; an intention must be shewn as to each particular property. There is no such irresistible inference of intention in the case of the colliery shares as there is in the case of the other properties. There must be found on the face of the will itself an intention to give property which is not the testator's own. The principle of the cases on election applies. The use of the word "my" is not sufficient; the inference that the testator meant to dispose of property which was not his own absolute property arises only where there is no other property which can answer the description. The rule as to the exercise by will of special powers is the same as the rule before the *Wills Act* as to the exercise of all powers; the law has been altered only as to general powers: *Maddison* v. *Chapman* (1); *Rooke* v. *Rooke* (2).

(1) 1 J. & H. 470. (2) 2 Dr. & Sm. 38, 46.

PEARSON, J. 1885 *In re* WAIT. WORKMAN *v.* PETGRAVE.

Trustram, for other persons entitled in default of appointment:—

The gift of the shares in the *Braysdown Colliery* is combined with a gift of shares in other collieries to which the power of appointment did not extend. With regard to those shares the word "my" must necessarily be restricted to the testator's own absolute property, and the Court cannot give different meanings to the word "my" in the same gift.

The true inference from the use of the word "my" is that the testator did not intend to exercise the power: *Jones* v. *Curry* (1); *Webb* v. *Honnor* (2); *Lovell* v. *Knight* (3); *Evans* v. *Evans* (4); *Noel* v. *Noel* (5).

W. W. Karslake, Q.C., and *G. Miller*, for the executors.

Fooks, Q.C., and *W. Fooks*, for the trustees of the settlement.

Daw; and *Clifford*; for other parties.

Cozens-Hardy, in reply:—

Webb v. *Honnor* is distinguishable. In the present case the will must operate on some property which was not the testator's own, but which he could only dispose of by means of the power. Moreover, the persons to whom benefits are given are all objects of the power. That is a circumstance of some weight. The gift of shares in different collieries may well operate as an appointment, so far as regards the shares which were subject to the power, and as a bequest of such of the shares as belonged to the testator himself. The whole tenor of the will shews an intention to exercise the power as regarded the *Braysdown Colliery* shares.

PEARSON, J. (after stating the provisions of the settlement and the will), continued:—

It is admitted that the testator had no property at *Belluton* other than that over which he had the power of appointment, and that, therefore, unless he is to be taken to have exercised the

(1) 1 Sw. 66.
(2) 1 Jac. & W. 352.
(3) 3 Sim. 275, 280.
(4) 23 Beav. 1.
(5) 4 Drew. 624.

1885

In re WAIT. WORKMAN *v.* PETGRAVE.

power (although he has made no reference to it in any part of his will), the devise of his estate at *Belluton* must fail. It is plain, according to the settled rule of this Court, that under these circumstances the testator must be taken to have exercised the power of appointment as regards the *Belluton* estate. I must, therefore, read this gift as indicating, as plainly as anything can indicate, that, at the time when he made his will, he intended to exercise the power of appointment given to him by the settlement. The same observation applies to the devise of the *Sideham* estate. Stopping there for one moment, I am obliged to come to the conclusion that, at the time when the testator made his will, he did intend to exercise the power, and that he has well exercised it as regards two of the properties subject to it. The third property subject to the power was the quarter share in the *Braysdown Colliery*. Between the gift of the *Sideham* property, and that of the *Braysdown Colliery* shares, he devised some property which he states he had recently purchased. Then he makes a gift in these terms, "I give and bequeath all my shares and interest in the *Braysdown*, *Huish*, and *Writhlington Colliery Companies* unto and equally between my three daughters" (naming them) "as tenants in common, share and share alike." The question, is whether under that gift the settled quarter share in the *Braysdown Colliery* passed, or only those shares which belonged to the testator absolutely? It is said that the only reason why the *Belluton* and *Sideham* properties passed by the will is, that there was no other property of the testator to satisfy the gifts contained in the will. Had there been other property to satisfy those devises, then, as there is no reference whatever in the will to the power of appointment, and the property is described as belonging to the testator, only such property as belonged to him absolutely would have passed. But, inasmuch as there was no other property to satisfy those devises, and it is admitted that therefore the *Belluton* and *Sideham* properties did pass, it follows, as a matter of course, that the testator must be considered as having intended to exercise the power of appointment. Therefore, in construing the gift of the shares in the *Braysdown Colliery*, I am dealing with a will by which the testator was intending to exercise the power of appointment given to him by the settlement, and by which, as regards two of the properties subject to the power, he has beyond all

PEARSON, J. 1885 *In re* WAIT. WORKMAN *v.* PETGRAVE.

dispute exercised it. When, therefore, I come to the third property, which is given in precisely the same terms as the two properties which are admitted to have passed under the will, how can I possibly say that the testator did not intend to exercise the power with regard to that property also, and to appoint those shares which he had the power to appoint? If any authority had been produced shewing that, when a power has been twice exercised in a will, I must, in the case of a third gift, read the will just as I should if that were the only gift in it, and I had to determine whether the power had been exercised, I might have felt myself bound to follow that authority. But, in the absence of any such authority, I think that, when you find the testator intended to exercise the power, and did exercise it with regard to two properties subject to it, you ought in the case of a third gift, which may also comprise property subject to the power, to consider that the testator intended to exercise the power, and that he has exercised it.

Under these circumstances, I must hold that, under the gift of all the testator's share and interest in the *Braysdown Colliery*, the quarter share comprised in the settlement passed, as well as the shares to which the testator was absolutely entitled.

I cannot part with the case without expressing an opinion which I have entertained for a great many years (and which the experience of the last three weeks in this Court has most strongly confirmed) that I regret exceedingly that, not only ordinary laymen, but, as it seems to me, professional men, do not understand the great difficulty there is in drawing wills, and do not bestow a little more care and pains in endeavouring to draw them in such a way as that the numerous questions which often arise on them should be avoided. I regret to say that these questions often throw a great deal of expense on parties interested under the wills, and are the cause of great heartburnings and most bitter animosities.

Cozens-Hardy:—The gentleman who drew this will was a new solicitor, and he was not informed of the existence of the settlement.

PEARSON, J.:—He ought to have been informed.

Cozens-Hardy:—Still he was not to blame.

PEARSON, J.:—I do not know who was to blame in this instance, but I only say that greater care ought to be taken in drawing wills. Very often a will is most carefully drawn, so far as the phraseology goes, but either the person who draws it is improperly instructed, or in some other way a mistake is made which creates difficulty and worse than difficulty. During the last three weeks I have disposed of not less than thirty will cases in which questions have arisen through some mistake.

Solicitors: *Mead & Daubeny*, agents for *Fox & Whittuck, Bristol; J. E. Fox & Co.*, agents for *E. C. Petgrave, Bath; Merediths, Roberts, & Mills; Coode, Kingdon, & Cotton.*

W. L. C.

ROBERTSON *v.* RICHARDSON.

[1884 R. 800.]

Life Estate—Forfeiture Clause—Bankruptcy—Discharge of Bankrupt—Reassignment of Estate.

Under the trusts of a marriage settlement a life interest in property brought into settlement by the wife was given, after her death, to the husband, but the trust in his favour was to cease in the event of his bankruptcy or liquidation and there was a gift over on that event. In August, 1881, he filed a liquidation petition under which, in October, 1881, a trustee of his property was appointed. In January, 1883, he obtained a discharge. In April, 1884, the wife died. In March, 1885, the trustee assigned for value to the debtor all the property belonging to him at the commencement of the liquidation and devolving on him subsequently, up to the date of the discharge, other than that which had been already received by the trustee. The liquidation was never formally closed, but the trustee had never made any claim to the income of the settled fund:—

Held, that, inasmuch as, before the re-assignment by the trustee to the debtor, income had become due to him, which, but for the forfeiture clause, the trustee might have received, the forfeiture had taken effect.

White v. *Chitty* (1), *Lloyd* v. *Lloyd* (2), and *Ancona* v. *Waddell* (3) distinguished.

THIS action was brought for the execution under the direction of the Court of the trusts of two indentures of the 14th of August,

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) 10 Ch. D. 157.

PEARSON, J. 1885 ROBERTSON v. RICHARDSON.

1879, and the 29th of September, 1879, respectively, the latter deed being a settlement made, after the marriage of *W. W. Robertson* with *Mary Jessie* his wife, in pursuance of articles entered into before the marriage. By virtue of these two deeds *W. W. Robertson* was, after the death of his wife, entitled to the income of certain property (part of which had been brought into settlement by her) during his life: "Provided always, that if the said *W. W. Robertson* shall charge, assign, or otherwise dispose of the said income, or any part thereof, or purport so to do, or shall become bankrupt, or present a petition, or call a meeting, or do any other definite legal act for the liquidation of his affairs by arrangement with his creditors, or execute any deed of arrangement or composition for the benefit of his creditors, or do or suffer anything whereby the said income, or any part thereof, would, if payable to him absolutely, become vested in any other person, then and in such case the trust hereinbefore declared in favour of the said *W. W. Robertson* shall cease, so far as regards the income of the property formerly belonging to the said *Mary Jessie Robertson*, or of the investments representing the same, and, during the remainder of his life, the said trustees may, at their discretion, apply the whole or any part of the said income arising from the property formerly belonging to the said *Mary Jessie Robertson*, which would, but for this provision, have been payable to the said *W. W. Robertson* or his assigns during his life, for the support and benefit of the said *W. W. Robertson* and the said *W. A. B. Robertson* and *Constance Rachel Robertson*" (infant children of Mrs. *Robertson*), "or any one or more of them, as the said trustees shall think fit, and shall pay and apply the surplus (if any) of the said income arising from the property formerly belonging to the said *Mary Jessie Robertson*, which would, but for this proviso, have been payable to the said *W. W. Robertson* or his assigns during his life, to the person or persons, or in manner, to whom, or in which, the said income would be payable or applicable under these presents if the said *W. W. Robertson* were dead." And, after the death of the wife, and subject to the respective determinable and absolute life interests of the husband, the trustees were to stand possessed of the property formerly belonging to the wife, and part of the property formerly belonging

to the husband, in trust for the said two infant children of the wife as therein mentioned; and also, after the deaths of the wife and the husband, the trustees were to stand possessed of the remainder of the property formerly belonging to the husband in trust for three children of his by a former marriage as therein mentioned.

On the 4th of August, 1881, *W. W. Robertson* filed a liquidation petition under the *Bankruptcy Act*, 1869, under which his creditors resolved on a liquidation of his affairs by arrangement, and a trustee of his property was appointed on the 8th of October, 1881. On the 18th of December, 1882, his creditors granted him his discharge, in consideration of the payment of the sum of £400 (which was contributed by the debtor's friends) to the trustee. The £400 was paid to the trustee, and on the 1st of January, 1883, the discharge of the debtor was duly certified. On the 1st of April, 1884, Mrs. *Robertson* died. This action was then commenced by her two infant children, by a next friend, against the trustees of the deeds, and on the 28th of May, 1884, judgment was pronounced for the execution of the trusts of the two deeds, and certain inquiries and accounts were directed to be made and taken. On the 9th of July, 1884, an order was made in the action, giving the Defendants liberty to pay to *W. W. Robertson* the sum of £10 a week, so long as (*inter alia*) he properly maintained the Plaintiffs during their respective minorities, or until further order, and also giving the Defendants liberty to apply the sum of £99 per annum for clothes, &c., for the Plaintiff *W. A. B. Robertson* during his minority, or until further order, and to apply the sum of £60 per annum for clothes, &c., for the Plaintiff *Constance Rachel Robertson* during her minority, or until further order. The trustee in the liquidation of *W. W. Robertson* never made any claim to the income given to him by the settlement of the property formerly belonging to the wife. On the 17th of March, 1885, the trustee in the liquidation, in consideration of £175 paid to him by the debtor, granted and conveyed to the debtor all and singular the real and personal estate whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy, and whether vested or contingent, of or to which the debtor was at the commence-

PEARSON,J. 1885 ROBERTSON v. RICHARDSON.

ment of the liquidation proceedings, or subsequently up to the date of his discharge, seised, possessed, or entitled (other than such estate as had already been received by the trustee) to hold the same unto and to the use of the debtor in as full and ample a manner, to all intents and purposes whatsoever, as if the liquidation proceedings had not been instituted. On the 28th of March, 1885, an order was made in the action, without prejudice to any question, giving the Defendants liberty to continue the payment to *W. W. Robertson*, pursuant to the leave given by the order of the 9th of July, 1884, he undertaking to apply all moneys so paid in (*inter alia*) properly maintaining the Plaintiffs, and also undertaking that, in the event of his being held not to have forfeited his life interest under the settlement, he would give credit for all moneys already paid and thereafter to be paid pursuant to the order of the 9th of July, 1884, and the order now being stated, as payments made in respect of such interest. On the 12th of May, 1885, an order was made that, notwithstanding the orders of the 9th of July, 1884, and the 28th of March, 1885, the Defendants should be at liberty to apply the sum of £200 per annum for the maintenance of the Plaintiff *W. A. B. Robertson* during his minority, or until further order, and to apply the sum of £200 per annum for the maintenance of the Plaintiff *Constance Rachel Robertson* during her minority, or until further order; and that, without prejudice to any question in the action, the Defendants should be at liberty to pay to *W. W Robertson* the sum of £400 per annum for his maintenance, during the minority of the Plaintiffs, or until further order, he undertaking that, in the event of his being held not to have forfeited his interest under the settlement, he would give credit for all moneys to be so paid as payments made in respect of such interest.

The action now came on for further consideration, and the principal question was whether *W. W. Robertson* had forfeited his life interest under the settlement.

Haldane, for the Plaintiffs:—

The forfeiture of *W. W. Robertson's* life interest has taken effect. The trustee in the liquidation could have claimed the income, but for the forfeiture clause.

Cookson, Q.C., and *J. W. Middleton*, for *W. W. Robertson*:—

The forfeiture clause has not operated. The trustee never made any claim to any part of the income, and he cannot do so now by reason of the re-assignment to the debtor. The intention of the settlor was only that the income should not devolve on strangers: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); *Ancona* v. *Waddell* (3).

1885

ROBERTSON v. RICHARDSON.

Levett, for the trustees.

C. Church, for the children of the husband.

Haldane, in reply:—

The cases cited are all distinguishable. During the interval between the filing of the liquidation petition, and the re-assignment by the trustee, the income was, under the order of this Court, applied in accordance with the forfeiture clause.

PEARSON, J.:—

I should have been very glad if I could have followed the decisions of *Wood*, V.C., in *White* v. *Chitty* and *Lloyd* v. *Lloyd*. Whatever might have been my own view, I should have cheerfully submitted my judgment to that of such an experienced Judge, though I should still have felt that, in his desire to carry out the intention of the settlor, he had gone as far as it was possible for the Court to go in holding that no forfeiture had taken place. But it is remarkable that in both those cases the Vice-Chancellor based his judgment in a great measure upon this, that, between the time when the right to the income in question had accrued to the person who had become bankrupt, and the time when the adjudication of bankruptcy was annulled or superseded, not only had there been no attempt on the part of the assignee in bankruptcy to receive that income, but there had been no income in fact which could have been received. In *White* v. *Chitty* the bankrupt himself had been in occupation of the house which had been devised to him for his life, and no rent could have been demanded from him until he had been charged with an occupation rent. In *Lloyd* v. *Lloyd* the gift was of the income

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) 10 Ch. D. 157.

PEARSON, J. 1885 ROBERTSON v. RICHARDSON.

of a share of residue, and the bankruptcy was annulled within a year after the death of the testatrix. The Vice-Chancellor said (1): "The question being whether or not the legatee has, by any act or default, or by operation of law, aliened, charged, or disposed of his life interest, I find that, although there was an act of the bankrupt which *primâ facie* had that effect, yet that no one has interfered to realize the property, and that the bankruptcy has been intercepted by annulment of the adjudication." In *Ancona* v. *Waddell* (2) the legatee became bankrupt in the lifetime of the testatrix. He took under the will a life interest in a share of the residue, and his creditors assented to a composition within a month after the death of the testatrix. The residue was not divisible till a year after the death of the testatrix, and therefore, before the legatee was entitled to receive any part of the income, the bankruptcy had been put an end to. It is true that this was not finally carried out for several years afterwards, but the trustee in the bankruptcy had made no attempt to intercept the income. In the present case the bankrupt's wife died in April, 1884, and in June he would have become entitled to receive an apportioned part of the income, or, at any rate, he would have become entitled to receive the income six months after his wife's death. At that time he had no protection whatever from the trustee in the liquidation. But for the clause of forfeiture, the trustee would have been entitled to receive the income, and was the only person who could have given a discharge for it, and it must be assumed that he would have performed his duty and would have obtained possession of the income. Indeed, proceedings were taken in this action on behalf of the children on the footing of a forfeiture having taken place. The circumstance which was relied on in all the three cases to which I have referred in order to escape from the clause of forfeiture, viz., that no right to receive the income in question had accrued to the assignee in bankruptcy, is wanting in the present case, and I am bound to decide that the forfeiture clause took effect, and is still in operation.

Solicitors: *Frank Richardson & Sadler; Hatton & Westcott; F. J. & G. J. Braikenridge.*

(1) Law Rep. 2 Eq. 724. (2) 10 Ch. D. 157.

W. L. C.

In re LEICESTER CLUB AND COUNTY RACECOURSE COMPANY. *Ex parte* CANNON.

PEARSON, J.

1885

July 30, 31.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 7 [*Revised Ed. Statutes, vol. xiv., p.* 211]—*Priorities of Debts—Directors' Fees.*

In a company where directors were obliged to be members:—
Held, that a director's unpaid fees were debts due to him in his character of member, and to be postponed to outside creditors.

UNDER an agreement made in May, 1884, by the official liquidator of the *Leicester Club and County Racecourse Company, Limited*, the whole assets of the company were sold to Mr. *John Robinson* for a sum equal to 7*s.* 3*d.* in the pound on the debts of the company.

The Chief Clerk's certificate of debts was filed on the 24th of November, 1884, with two schedules of debts. With reference to the second schedule the certificate stated: "The claims which are set forth in the second schedule have been allowed at the sums therein stated with the costs therein mentioned to the persons therein named for their fees as directors of the company, and are payable to the said creditors only after all the other creditors of the company have been paid in full." Dividends of 7*s.* 3*d.* in the pound had been paid on all the debts mentioned in the first schedule, and the creditors in respect of those debts had assigned their debts to *John Robinson*.

This was a summons on behalf of *Thomas Cannon*, a former director, a creditor in respect of a sum of £212 2*s.* allowed in the second schedule, for an order on the official liquidator directing payment of a dividend on the £212 2*s.*, and if necessary a declaration that the statement in the Chief Clerk's certificate that such debts were only payable after payment in full of the debts in the first schedule was erroneous, and that if necessary the certificate might be varied.

One of the articles of association of the company provided that directors should vacate their office, among other ways, by ceasing to be members. No qualification of directors was expressly provided by the articles. Directors were disqualified from voting

PEARSON, J. in respect of contracts in which they were personally interested.

1885

In re LEICESTER CLUB AND COUNTY RACECOURSE COMPANY. *Ex parte* CANNON.

One question on the summons was whether the fees due to Mr. *Cannon* were due to him in his character of member for dividends, profits, or otherwise?

The articles provided that "The remuneration of the directors for their services shall be such sum as the company in general meeting may from time to time determine, which shall be divided amongst the directors in such manner as they shall from time to time think fit."

Everitt, Q.C., and *D. L. Alexander*, for *Thomas Cannon*:—

The word "otherwise" will not in this section include directors' fees, it has been held not to include debts due to members for advances: *Grissell's Case* (1); *In re West of England Bank* (2).

The remuneration of directors is similar to the remuneration of any other servants. There is no necessity under the Act or in the nature of things that directors should be members of the company. They are entitled to be paid their remuneration out of capital, and can sue the company in respect of questions arising out of their position as directors: *Orton* v. *Cleveland Firebrick and Pottery Company* (3); *Lewis' Case* (4); *Pulbrook* v. *Richmond Consolidated Mining Company* (5). Moreover in this case there is no right to remuneration given under the articles to directors as such; their only right to be paid is by vote of the shareholders in meeting. These incidents go to prove that the directors receive their remuneration in a capacity other than that of members. If a director's remuneration were due to him in his character of member it would not be within this section, for the word "otherwise" must be cut down to things in the nature of dividends.

Cozens-Hardy, Q.C., and *Geare*, for *Robinson*:—

The position of a director is not like that of a servant, it is more like that of a managing partner; he could not, in this company certainly, acquire his right to fees unless he were a member. It

(1) Law Rep. 1 Ch. 528.
(2) 12 Ch. D. 823.
(3) 3 H. & C. 868.
(4) 26 L. T. (N.S.) 673.
(5) 9 Ch. D. 610.

has been held that a director cannot maintain an action for fees: *Dunston* v. *Imperial Gas Light and Coke Company* (1); *Hutton* v. *West Cork Railway Company* (2); *Eley* v. *Positive Government Security Life Assurance Company* (3). The dominant words in the section are "in their capacity as members," and therefore the word "otherwise" will include all sums payable to members in that capacity. Directors' fees may properly be called profits.

J. Henderson, for the liquidator.

Everitt, in reply.

PEARSON, J.:—

The question shortly stated is this, whether, in the winding-up of a company which is not solvent, fees due to directors are to be paid *pari passu* with outside debts; or whether they are not to be paid until all the outside creditors have been paid in full. It is certainly a very extraordinary thing that while this question might have been raised at any period within the last twenty years, it has never been brought before the Court. What has happened in the meantime—how directors' claims for fees have been disposed of, I do not know. All parties I think agree, and I agree with them—that the case is to be disposed of on one sub-section of the *Companies Act* of 1862—the 7th sub-section of the 38th section That enacts that "no sum due to any member of the company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company." That which the Court is called upon now for the first time to determine is: is this "a debt due to a member of a company in his character of a member by way of dividends, profits, or otherwise?" First, let me see what the position of these directors is. In the articles of association by which this company is bound, the directors were to be members, because anyone appointed to be a director vacated his office if he ceased to be a member. Then the remuneration was given in this way: "The remuneration of the directors for their

(1) 3 B. & Ad. 125.
(2) 23 Ch. D. 654.
(3) 1 Ex. D. 20.

PEARSON, J. 1885 *In re* LEICESTER CLUB AND COUNTY RACECOURSE COMPANY. *Ex parte* CANNON.

services shall be such a sum as the company shall, in general meeting, from time to time determine, which shall be divided amongst the directors in such manner as they shall from time to time think fit." There was therefore no remuneration fixed. It depended entirely upon the the goodwill of the general meeting, whether any, or what, remuneration was given to the directors.

Now in one of the cases which was cited to me, *Dunston* v. *Imperial Gas Light and Coke Company* (1), Mr. Justice *Park* says this—it was an action by a member of a corporation who was a director against the company—"It is not necessary to decide, whether an action would lie at the suit of a clerk or servant employed in the trade of a company like this, under a contract not sealed. Here, the character of the party for whom remuneration is claimed, is not that of a servant, but of a manager." And in a very recent case which came before the Court of Appeal, the case of *Hutton* v. *West Cork Railway Company* (2), there is a passage in Lord Justice *Bowen's* judgment in that case which runs thus: "Mr. *Hardy* has pressed upon us the fact that it is amply within the powers of an ordinary company to pay away money for the remuneration of its directors in the past. I do not say it is not so, within certain limits. But what is the remuneration of directors? I think it is pretty clear that, like the compensation for loss of the services of the managing director, it is a gratuity. A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, that he is to have a right to be paid for it. In some companies, not in railway companies, perhaps, so often as in other companies, but in some companies, there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity, as was pointed out in the case cited by Mr. *Cookson*, of *Dunston* v. *Imperial Gas Light and Coke Company*. Directors, under those circumstances, often do get money. But whenever they get it it is in the nature of a gratuity voted."

(1) 3 B. & Ad. 132. (2) 23 Ch. D. 671.

Now, I think it is plain from that, and it is plain also from other cases, that you cannot treat the directors and say that they are in the nature of servants who are being paid for their services in the way in which servants are paid. It seems to me on the contrary that they continue members of the company, and I prefer to call them working members of the company, who get paid for the work that they do.

Mr. *Everitt* who argued this case for Mr. *Cannon*, put his case very fairly in this way, and I hope I shall not be doing injustice to what was a very clear and able argument on the subject. He says this:—"It is perfectly true that up to the time that the vote was passed for the money the directors had no claim for it; it may be remuneration, and nothing but remuneration, and nothing but expected remuneration up to that time, but when the vote is passed the money becomes due to the directors, it is then a debt, a debt which they are just as much entitled to be paid as any creditor of the company is entitled to be paid a debt that is due to him; then it is due to him for services which have been rendered; it is due for work done just as any other money which they have paid for labour performed on their behalf is also due for work done. That being so it is to be considered as due to the member in his personal capacity, and therefore it does not come under this section, which says that the debt which is not to come into competition with outside creditors must be a debt due to him in the character of a member." There it is that I differ from Mr. *Everitt*. To my mind the directors cannot divest themselves of their character of members of the company. From first to last, while they are sitting as directors, they are doing their work in the capacity of members, and working members of the company, and what shews it to my mind as clearly as can be, is the ordinary rule which is to be found actually in these rules themselves, that no director shall vote in respect of any question arising out of a contract in which he may be interested, and if he does so vote, his vote shall not be counted. They separate therefore entirely the business a director is doing on his own account from the business that he does, not on his own account, but on account of the company generally. The one is done by him in his capacity of working member, the other is done by him in his individual capacity and in no other way. Under

PEARSON, J. 1885 *In re* LEICESTER CLUB AND COUNTY RACECOURSE COMPANY. *Ex parte* CANNON.

these circumstances I come to the conclusion that this is, strictly within the terms of the section, a debt due to the director in his character as a member, and that as such he cannot by possibility rank *pari passu* with the outside creditors. I do not think it necessary for me to rely on the words "or otherwise." The words "or otherwise" are undoubtedly wide enough to include such a debt as this, but I agree with Mr. *Everitt* in thinking that the more stringent words in the section and those which are most exclusive are the words "in his character of a member." I must come to the conclusion that the Chief Clerk is right in putting the debt in the second schedule and saying it should not come into competition with the debts of the outside creditors of the company.

Solicitors: *H. Montagu ; Geare, Son & Pease ; Baylis & Pearce.*

D. P.

PEARSON, J. 1885 *July* 31; *Aug.* 3.

MIDLAND RAILWAY COMPANY *v.* MILES.

[1885 M. 2303.]

Railway Company—Minerals under or near Railway—Mineral Estate intersected by Railway—Right of Owner to work Mines—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77–82 [*Revised Ed. Statutes, vol. ix., p.* 726].

Sect. 80 of the *Railways Clauses Consolidation Act*, 1845, applies to minerals lying more than forty yards from a line of railway, and enables the owner of minerals, whose access to them is cut off, by reason of a railway company having purchased from him the minerals lying under their line of railway, or within forty yards from it, to tunnel under the railway for the purpose of working his minerals which are on the other side of it. And this power extends, not only to minerals in the ordinary sense of the word, but also to such a substance as clay, which is usually worked from the surface.

And by sect. 81 the mineral owner is entitled to be compensated by the company for any additional expense caused by his having to work the minerals in this way.

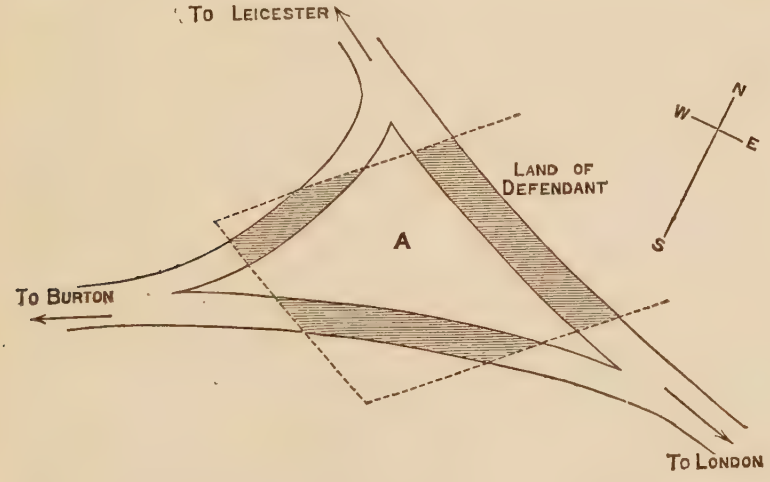
The Defendant was the owner of the minerals lying in and under a triangular piece of land, which was completely surrounded by three lines of railway belonging to the Plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface of the triangular piece of land, and also the surface of the land on which those parts of the three lines were constructed. The minerals in and

under the lands so purchased were not in the first instance purchased by the company. The Defendant, in April, 1885, gave the company notice, under sect. 78 of the *Railways Clauses Consolidation Act*, 1845, of his intention to work the minerals belonging to him in and under the triangular piece of land, and also under the lines of railway. The company gave the Defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The Defendant then gave the company notice that he intended to work the minerals in and under the triangular piece of land, and for that purpose to enter upon and across the line of railway:—

Held, that such a mode of working would be a trespass, and that the Defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals in and under the triangular piece of land, and that the company must compensate him for the extra expense of so working.

MOTION for an injunction to restrain the Defendant from trespassing on the Plaintiffs' line of railway.

The Defendant was the owner of the mines and minerals under a piece of land situate close to *Knighton Junction* on the Plaintiffs' main line of railway from *London* to *Leicester*. The piece of land was completely surrounded by three lines of railway belonging to the Plaintiffs, which formed a triangle, as shewn in the annexed figure.



The land forming the sites of the shaded parts respectively of the three lines of railway, and the land A inclosed between those shaded parts and the dotted lines in the plan, had been purchased

PEARSON, J. 1885 MIDLAND RAILWAY CO. v. MILES.

by the company from, and conveyed to them by, the Defendant's predecessor in title. The conveyances contained no express conveyance or reservation of the mines and minerals under the lands conveyed. The Defendant was the owner of other land lying on the north-east side of the Plaintiffs' main line from *London* to *Leicester*.

On the 4th of April, 1885, the Defendant gave to the Plaintiffs, pursuant to sect. 78 of the *Railways Clauses Consolidation Act*, 1845, a notice in writing, that he should, after the expiration of thirty days, commence to work, dig, get, and carry away the clay or other minerals lying under the shaded portions of the lines of railway and under the piece of land A. On the 13th of June, 1885, the company gave the Defendant notice that, inasmuch as the working and carrying away of the minerals under the shaded parts of the lines of railway would damage the works of the railway, the company were willing to make compensation for any estate and interest to which the Defendant might be entitled in the mines and minerals under those shaded parts. On the 19th of June, the Defendant gave notice to the company that he required £12,000 as compensation for the minerals under the shaded parts and the minerals under the land A, and he afterwards gave notice to the company of the appointment of an arbitrator on his behalf to assess the compensation which he claimed.

The company refused to accept this notice, on the ground that it went beyond the notice which they had given. On the 27th of June, the Defendant's solicitors threatened that their client would work the clay under the piece of land A, and cart it across the Plaintiffs' line of railway. The Plaintiffs then commenced this action on the 7th of July, claiming an injunction to restrain the Defendant, his servants and agents, from passing, with or without horses, carts, vehicles, and appliances, over, or otherwise trespassing on, the Plaintiffs' lines of railway and works. On the 16th of July the Plaintiffs appointed an arbitrator on their behalf, and gave notice thereof to the Defendant. He on the 24th of July withdrew his claim to compensation for the minerals under the land A, and appointed an arbitrator on his behalf. At the same time he served on the company a notice in writing, that he should within six days proceed to enter upon and across the

company's railway, for the purpose of working and carrying away the minerals in and upon the piece of land A. The company then gave notice of motion for an injunction in the terms of their claim in the action.

Cozens-Hardy, Q.C., and *Phipson Beale*, for the company:—

The Defendant is not entitled to trespass on the railway and practically put a stop to the traffic.

Sect. 80 of the *Railways Clauses Act* enables him to work the minerals under the triangular piece of land by means of tunnelling under the railway, and under sect. 81 the company will have to compensate him for the additional cost of working in that way. What he wants is, to compel the company to pay any price he likes to ask for the minerals under the triangular piece of land.

Everitt, Q.C., and *Chadwyck Healey*, for the Defendant:—

The minerals under the triangular piece of land being reserved to the Defendant, he must have a right to work them, and a right of way across the railway for the purpose of working them is reserved to him by implication: *Earl of Cardigan* v. *Armitage* (1).

Sect. 80 applies only to mines the working of which is prevented by reason of apprehended danger to the railway. It deals only with minerals which the company have the option of purchasing, *i.e.*, minerals under the railway or within the limit of forty yards on either side of it. It applies, if the company purchases the minerals under the railway, to the minerals within the forty yards' limit, but it has no application to minerals beyond that limit. At any rate, it cannot apply to minerals which can only be worked from the surface, such as clay and gypsum, which are what the Defendant desires to work.

The rights of an owner of mines under a railway are illustrated by *Great Western Railway Company* v. *Bennett* (2), and *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (3). The rights of a railway company as to mines under or near their line are regulated entirely by statute, and they have not the ordinary rights of a purchaser of the surface in fee simple.

(1) 2 B. & C. 197. (2) Law Rep. 2 H. L. 27. (3) 20 Ch. D. 552.

PEARSON, J. PEARSON, J.:—

1885

MIDLAND RAILWAY CO. v. MILES.

I do not intend to express a finally concluded opinion as to the proper construction of the sections of the *Railways Clauses Consolidation Act*, because I am now dealing with an interlocutory application only. I think I am right in saying that in a recent case the Court of Appeal laid down again that which I conceive to have been formerly for many years the rule of this Court with regard to the granting of interlocutory injunctions, viz., that, if the Court can see that there is a great probability of the plaintiff's succeeding at the trial of the action, or if, upon the balance of convenience and inconvenience, the balance is strongly in favour of granting an injunction, then the Court will be right in granting a temporary injunction until the case can be fully heard and decided at the trial.

I agree with Mr. *Everitt* that a railway company and the rights of a railway company are the creatures of statute, and that a railway company does not stand with regard to its land in the same position as an ordinary purchaser in fee simple absolute. I must, therefore, look solely to the Act in order to see what are the rights as between the company and the Defendant in this matter. [His Lordship stated the facts and continued:—] Sect. 77 of the *Railways Clauses Act* states most positively that an ordinary conveyance of land to a railway company shall not include the minerals under the property. That provision is undoubtedly intended more or less for the protection of the railway company. It saves the company from having to expend their money in purchasing the minerals, if, at the time when they make the purchase, there is little probability of the minerals ever being worked. It puts off the evil day of reckoning for the company, until such time as the owner of the minerals under the railway desires to work them. The moment the owner in whom the minerals remain vested desires to work them, either under the railway or within the prescribed distance, *i.e.*, forty yards, if no other distance is prescribed, sect. 78 provides that he is to give thirty days' notice to the company, and the company are then, either to purchase the minerals lying under the railway, or, if that is not sufficient for their protection, the minerals lying within forty yards of the railway, or, if the company are so

minded, they may neglect the notice, and not purchase, but in the latter case the owner is remitted to all his rights with regard to the minerals. He is at liberty then to work the minerals as he pleases, provided that he does so in the proper and usual manner. And, in the recent case of *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1), an owner had given notice to a railway company to purchase the clay which formed the substratum of the railway, and the company had declined to do so, whereupon the owner proceeded to dig the clay in such a manner as to let down the railway, and the Court held that he had a right to do so. For these two cases, therefore, the Act has provided; it has enabled the company to purchase the minerals, and it has provided what the owner's rights are to be, if the company declines to purchase them. But there is a third case, and that is the present case, for which, as I read the Act, it has also provided. The railway might be made across mineral property—mineral property lying on both sides of the line when constructed, and it occurred to the draftsman that, the company having purchased, at the time when the railway was made, so much of the surface as they required, if the owner of the minerals at any future time desired to work them, and the company gave him notice to purchase so much of them as might be necessary for the support of their railway, the result might be that the company would then in effect erect a barrier across the property, separating one portion of the mineral property of the owner from the other portion, so that his only way of access from the one side to the other of the minerals which he desired to work would be either over or under the railway. To allow him to go over the railway would be in effect to put an end to that which the Legislature had thought would be beneficial to the public, viz., the existence of the railway, because it is plain that the traffic of the railway could not be carried on with safety to the public, if the mineral owner was allowed to be perpetually carting minerals across the railway from the one side to the other. The interference with the railway would be so constant and so great as to stop the whole traffic of the line. Therefore the Legislature, desirous of protecting the rights of the owner of the mines, and desirous also of protecting

(1) 20 Ch. D. 552.

PEARSON, J. 1885 MIDLAND RAILWAY CO. v. MILES.

the railway company, have provided, by sect. 80, that, in that event, the mineral owner shall be at liberty to make all necessary passages under the railway, without doing injury to the railway, so as to enable him to work the minerals on the one side from the other side. That, to my mind, is the meaning of the 80th section of the Act. The heading of the fasciculus of sections, from 77 to 85 inclusive, is this: "And with respect to mines lying under or near the railway, be it enacted." That seems to me to include mines which lie at a greater distance than forty yards. Then sect. 78 gives the company power to purchase mines under the railway and within forty yards of it, and sect. 80 says, "If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway," (I read that as meaning that, if the working of any mines under the railway works or within forty yards therefrom, be prevented by reason of the company purchasing those mines,) "it shall be lawful for the respective owners, &c., of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water-levels through the mines, measures, or strata, the working whereof shall be so prevented" (that is, if necessary, through the whole forty yards on either side of the line) "as may be requisite to enable them to ventilate, drain, and work their said mines." Then it prescribes the dimensions of the airways, headways, gateways, and water-levels, and adds, "Nor shall the same be cut or made upon any part of the railway or works, or so as to injure the same, or to impede the passage thereon." It seems to me, therefore, that the Act itself has provided what is to be done when the company have in this way severed the mines of a mineral owner, and that, instead of his having the right, which is claimed by this Defendant, of going across the railway, the Act says, "You shall be at liberty to go under the railway, but in going under it you must work in such a manner as not to injure it or impede the traffic thereon." Then sect. 81 provides for the extra expense to which the owner may be put by reason of his being required to work his mines in this way. It says that, "The company shall from time to time pay to the owner of any such mines, extending so as to lie on

both sides of the railway all such additional expenses and losses as shall be incurred by such owner by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid" (that is by the barrier interposed by the company) "or by reason of the same being worked in such a manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway." Now in the present case the Defendant is the owner of mineral property lying on both sides of the railway. On the one side he can work without injury to the railway at all. The railway company, by giving him notice to purchase the minerals under the railway, have erected a barrier between one part of his property and the other part. It seems to me that the 80th section gives him power to make passages under the railway to enable him to work the severed minerals, and the 81st section gives him a right to compensation for any additional expense which he may incur, and any loss which he may suffer, by reason of his having to work the minerals in that way. Mr. *Everitt* urged very strongly that, inasmuch as the minerals which the Defendant desires to work (gypsum, or clay, or something of that sort) lie on the surface, it will not be practically possible for him to work them in that way, and that the injunction would practically prevent him from working them at all. But the 81st section meets that difficulty also, for it provides that, for any minerals which cannot be obtained, and from which the owner is cut off, the company are to compensate him. Under these circumstances, I think the company are right in saying that the Defendant is not entitled to trespass upon the railway in order to carry the minerals across it. Ample means are given him by the Act, either, if he works the minerals at a greater expense, of obtaining compensation from the company, or, if he cannot get the minerals at all, of claiming from the company their value. I must, therefore, grant the injunction.

Solicitors: *Beale, Marigold, & Co.; Gedge, Kirby, & Millett.*

W. L. C.

PEARSON, J. 1885 Aug. 6, 7.

TEULIERE *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

[1883 T. 1738.]

57 *Geo.* 3, *c. xxix., ss.* 80, 82—*Compulsory Purchase—Severance.*

A metropolitan vestry required, for the purpose of widening a street, a part of the buildings and site of an orphanage that would leave a substantial portion of the premises:—

Held, that (the owners wishing to sell the part required only) the vestry could not take the whole.

THE Plaintiffs were the trustees of *St. Vincent's Orphanage, Church Street, Kensington.* The orphanage, buildings, and gardens stand on an area of about half an acre, having a frontage to *Church Street* of 135 feet. The Defendant vestry took steps to widen *Church Street* under the powers they possess under the Act 57 Geo. 3, c. xxix. On the 4th of July, 1883, the vestry passed a resolution, "That for the improvement of *Church Street, Kensington*, it is desirable to widen so much of the said thoroughfare as lies between *Duke's Lane* and *Vicarage Gardens*, and the vestry do hereby adjudge that the houses, walls, buildings, lands, tenements and hereditaments, or portions thereof, respectively situate on the east side of *Church Street* and coloured red and blue on the plan marked A, prevent the widening of the said thoroughfare, and that the possession, occupation, and purchase of the said respective houses, walls, buildings, lands, and hereditaments will be necessary for carrying out the said improvement, and that notices thereof be served upon the several owners and occupiers of all such properties, of whatever nature, tenure, kind, or quality, for the purposes aforesaid, as provided by the statute 57 Geo. 3, c. 29, and that it be referred to the law and parliamentary committee to take such steps as may be necessary to carry the above resolution into effect." The property delineated and coloured red on the plan A, referred to in the resolution, was the Plaintiffs' premises, the part coloured blue consisted of the forecourts of houses fronting *Church Street.*

In pursuance of the resolution the Defendant vestry served

notice to treat for the sale of their premises on the Plaintiffs, dated the 20th of August, 1883. The object of this action was to restrain the Defendant vestry from taking any further proceedings under the notice to treat. The action now came on on motion by the Plaintiff, for an injunction in terms of the claim.

Sect. 80 of 57 Geo. 3, c. xxix., "An Act for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein," provides:—

"That for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the Commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to alter, widen, turn or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides or ends of any streets or public places within any parochial or other district, into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel or pave such new part or parts of any such streets or public places so altered, widened, extended, opened or lengthened as aforesaid; and that if any houses, walls, buildings, lands, tenements and hereditaments, or any part thereof, shall be adjudged by the said Commissioners or trustees or other persons as aforesaid to project into, obstruct or prevent them from so altering, turning, widening, extending, lengthening, continuing or opening the said streets or public places within the said parochial or other district, and that the possession, occupation and purchase of such houses, walls, buildings, lands, tenements or hereditaments, will be necessary for that purpose, it shall and may be lawful to and for the said Commissioners or trustees or other persons as aforesaid, and they shall have full power and authority, to treat, contract and agree, or to employ any person or persons to treat, contract and agree with the several owner or owners, occupier or occupiers of all such houses, walls, buildings, lands and hereditaments, of whatsoever nature, tenure, kind, or quality, for the purposes aforesaid, and to pay for the same such sum and sums of

PEARSON, J. 1885 TEULIERE v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

money as shall be agreed upon by the said Commissioners or trustees or other persons as aforesaid, and the owner or owners, occupier or occupiers thereof, out of the money to arise and be raised and to be received by them, either by virtue of any local Act or Acts of Parliament relating to such parochial or other district, or of this Act, and to pull down, use, sell or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also such other lands, tenements or hereditaments, or so much thereof as they the said Commissioners or trustees or other persons as aforesaid shall think proper, into the said streets or other public places, and all such new parts of such streets or public places; and the owners and occupiers of houses and buildings, messuages and other hereditaments therein and adjoining thereto, shall be subject and liable to all the rates, assessments, powers, provisions, orders, clauses and things to be made by virtue of or contained in any local Act or Acts of Parliament relating to such parochial or other district, or by virtue of or contained in this Act, in the same manner as the present streets and public places included in any such local Act or Acts, or within the jurisdiction of this Act, and the owners and occupiers of houses or buildings and messuages or other hereditaments therein and adjoining thereto."

Sect. 81 gives power to corporate bodies and incapacitated persons to sell property required. Sect. 82 provides, in case of owners refusing or being unable to treat, for the assessment of the value of the required premises by a jury. By sect. 96 the local authority is empowered to sell "all or any of the freehold or leasehold estates, lands, houses, hereditaments, and premises" which should be conveyed to them in pursuance of the Act, or otherwise, giving a right of pre-emption to the persons from whom the premises should have been bought.

It was in evidence that the taking of so much of the Plaintiffs' premises as was actually required to be thrown into the street would destroy some important rooms of the orphanage, including the school-room. The greater part of the buildings, however, would be left. One of the Plaintiffs made an affidavit, in which it was stated: "If the Defendants take only so much of the property as is required to widen the street, the managers would

reduce the number of children admitted, and if this is done the portion of the property remaining can, as I believe, be easily adapted so as to be sufficient for the requirements of the orphanage without any great outlay in new buildings:" and the Plaintiffs' architect deposed: "Expense must be incurred in adapting a portion of the brick buildings, and making several minor alterations to facilitate the working of the orphanage when curtailed. But it is not the fact that the whole of the buildings abutting on *Church Street* when widened would have to be reconstructed, and that they would be rendered useless unless almost rebuilt. In my opinion, the loss by severance could easily be made good."

Cookson, Q.C., and *Theobald*, for the Plaintiffs:—

The vestry have not, within the meaning of the Act, honestly and fairly adjudicated that they require the whole property. The whole of the premises cannot be required for the improvement, and so long as the house will not be utterly destroyed for its purposes the vestry cannot require the owners to sell the whole: *Thomas* v. *Daw* (1); *Gard* v. *Commissioners of Sewers of the City of London* (2).

Cozens-Hardy, Q.C., and *Methold*, for the vestry:—

Both the cases cited were, in the view taken by the Court of Appeal, decisions on the taking of a piece of land. The Court of Appeal abstained from deciding what would be the law in case of taking part of a house. In sect. 80 there is a manifest distinction between houses and land. Vice-Chancellor *Kindersley* was the only Judge who intended to decide the point, and he considered that the owner could not require the public authority to take part only of a house: *Thomas* v. *Daw*. By the Act the public authority are to adjudge whether the premises are required, and the Court will not go behind their adjudication: *Stockton and Darlington Railway Company* v. *Brown* (3).

PEARSON, J.:—

If I had any hope that I should understand this Act of Parliament after longer argument, I should have called for a reply. I am not ashamed to say I do not entirely understand it, because

(1) Law Rep. 2 Ch. 1. (2) 28 Ch. D. 486. (3) 9 H. L. C. 246.

PEARSON, J. 1885 TEULIERE v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

Lord *Cranworth*, Mr. Justice *Kay*, and the present Court of Appeal have all found the greatest difficulty in construing it. [His Lordship stated the facts, and continued:—] It is difficult to say how I ought to decide this case but I am assisted by two decisions in the Court of Appeal, one that of *Thomas* v. *Daw* (1), decided by Lord *Chelmsford*, the other, that of *Gard* v. *Commissioners of Sewers of the City of London* (2), before the present Court of Appeal, and by both of those decisions I need not say that I am bound. Lord Justice *Baggallay*, in dealing with this section, says (3): "Now, in the first place, what was the object of the 80th section? We are told by its introductory words that it was passed 'for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of the Act, and for the public advantage.' Now one can hardly think it was for the improvement of the streets, or for the public advantage, that more land should be taken than was wanted for the purpose of improving the streets, and these introductory words appear to indicate the intention of the Legislature." Then I am told by Lord *Chelmsford* in the decision of *Thomas* v. *Daw* (4), "This section is rather obscurely worded, but it appears to me to give the Commissioners power, if they please, to take part only of a house or building which may project into, obstruct, or prevent them from altering or widening any street. The words 'or any part thereof' in the early part of the section clearly apply to houses and buildings as well as to lands. But it is said that those words are dropped as the section proceeds; that in stating the persons with whom the Commissioners are to treat, they are called the owners or occupiers of all such houses, walls, buildings, lands, and hereditaments without these additional words; and that the Commissioners are empowered to pull down, use, sell, or dispose of such houses, walls, buildings, and materials thereof, which it was said must mean the entire houses, &c., not only from there being no qualification of the general words, but from the distinction which is made in what immediately follows between houses and lands in the words, 'and lay the sites thereof' (that is, of the houses, &c.) 'and also such other lands, &c., or so much thereof as the Commissioners shall think proper, into the

(1) Law Rep. 2 Ch. 1.
(2) 28 Ch. D. 486.
(3) 28 Ch. D. 505.
(4) Law Rep. 2 Ch. 6.

streets or other public places.' I cannot help thinking, however, that, imperfectly as it may be expressed, the words 'or so much thereof' must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the Commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. It appears to me that the subsequent parts of the section do not affect the preceding part, so as to strike out altogether the words 'or any part thereof' or to render them of no effect." Lord Justice *Bowen*, in commenting on that passage in Lord *Chelmsford's* judgment, says this (1): "Mr. *Graham Hastings* contends that they are necessarily bound to adjudicate the whole of the land to be necessary even if they only want a part, while the case of *Thomas* v. *Daw* (2) on the other hand, reads into the latter part of the section the words which occur in its earlier part 'or any part thereof.' I do not like saying that they were dropped out *per incuriam*. I prefer to say that in my opinion the general words in the latter part of the section, though differing from the general words in the earlier part of the section by the omission of those words, 'or any part thereof,' are nevertheless so wide as to embrace in themselves the part as well as the whole. I admit that this construction is not clear, but it seems to me that the opposite construction is not clear. It would be a very strong thing to clothe the Commissioners with an uncontrolled power of taking the whole of the property when they want only an infinitesimal part of it. Our present decision only applies to lands, and it is not necessary for us to decide whether the same rule applies to a house. There may be this distinction between the two cases, that in the case of land nobody can reasonably say it is necessary for the Commissioners to take all when they only want a part, but it may be that in the case of a house or building it may be necessary to take all when they only want to use part on the improvements. That would be a question of fact in each case, and I must be understood as reserving myself perfectly free if the question arises hereafter for consideration." Now, the use of the word "fact" there is, to my mind, very material. The Lord Justice does not say, as he might have said, that the statute authorizes the paving authority to take the whole and not part only, but he says that in each case it is a

(1) 28 Ch. D. 512. (2) Law Rep. 2 Ch. 1.

PEARSON, J. 1885 TEULIERE v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

question of fact, which, as I understand, means that I am to judge whether under the special circumstances the whole is to be taken or only a part. In this case, I have not the difficulty which I might have had if the vestry had wanted to take a part only and the owners had required them to take the whole, but I have the converse case. The question I have therefore to ask myself is, is not this the very case to which Lord Justice *Bowen* refers when he says that in all cases of this kind it is a question of fact in each case? If that be so I have no difficulty in deciding it, because I think the owners of the orphanage, having a large space of ground and such large buildings, and being willing to sell so much as the vestry require, are entitled to sell to the vestry that part only: and it is not unimportant to remember that in this view there is nothing but pounds, shillings, and pence between the parties, because the vestry will get what they want, and the owners are willing to give it to them.

I have come to this conclusion as the best I can arrive at. I grant an injunction restraining the vestry from acting on the notice they have already given, and from taking more than they require in making the improvement (the owners of the orphanage being willing to sell that part, and not requiring them to take the whole). I must put that in; for I am not willing to decide on this section anything more than is required; and I do not mean to say that in another case, if the owner require the vestry to take the whole, they will not be required to take the whole. I throw out no intimation of any kind on that question. I think if the vestry were going to take so much of the buildings that the portion left was a mere wall, or a staircase and one or two kitchens, it would be unreasonable as regards the owners for the vestry not to take the whole and as regards the vestry to make them pay for all the damage by severance; but, as I understand, a very substantial part of the house will be left. All that will be cut off will be a part, which the owners say can be replaced, or at all events, reinstated so far as to enable them to use the other parts as perfectly as they can now.

Solicitors: *Blount, Lynch, & Petre; Pontifex, Hewitt, & Pitt.*

D. P.

NORTON *v.* JOHNSTONE.

PEARSON, J

1885

Aug. 4, 11.

[1877 N. 8.]

Tenant for Life and Remainderman—Trust for Accumulation of Rents to pay Mortgage Debts—Sale of Mortgaged Estate by Mortgagee—Right of Tenant for Life to possession.

A testator devised his real estates (in the events which happened) to the use of the Plaintiff for life; with remainder to the use of the Plaintiff's first and other sons successively in tail male; with remainder over to the use of another person in fee. The will provided that, immediately after the death of a prior tenant for life (who died before the testator), the trustees of the will should receive the rents, and, after paying thereout the interest on the mortgages on the estates, should accumulate the residue, until the amount of the accumulations should be sufficient to discharge the principal of the mortgages. And the testator directed that, as soon as the accumulations should be sufficient to pay off the mortgages, the trustees should forthwith pay them off. And he declared that the Plaintiff, or other the person for the time being entitled for life or in tail to the estates under the limitations of the will, should not be entitled to receive any part of the rents until the mortgages had been paid off. After the testator's death the mortgagees sold those parts of the estates which were comprised in their mortgages. The proceeds of sale were not enough to pay the whole of the mortgage debts, and the balance was paid out of the accumulations of rents. A surplus of accumulations remained:—

Held, that the tenant for life was entitled to be let into possession of the estates which remained unsold, and to have the surplus of the accumulations paid to him.

PETITION by a tenant for life of settled estates, asking that he might be let into possession of the real estates, the subject of the settlement.

Fletcher, Lord *Grantley*, by his will, dated the 10th of August, 1863, devised all his real estates to trustees in fee; as to his estates in *Surrey* and *Sussex*, to the use of his wife for her life; and, as to those estates, from and immediately after her death, and, as to the rest of his estates, from and immediately after his own death, to the use of *G. C. Norton* (who died in the testator's lifetime) for his life, and after his death to the use of the testator's great nephew *Richard Brinsley Norton* (afterwards Lord *Grantley*) for his life; with remainder to the use of his first and other sons successively in tail male; with remainder to the use of *Charles Grantley*

PEARSON, J. 1885 NORTON v. JOHNSTONE.

Campbell Norton in fee. The will contained a proviso that, from and immediately after the death of *G. C. Norton*, the trustees should receive and take the rents, issues, and profits of the estates, and, after paying thereout from time to time the interest payable in respect of the mortgages or incumbrances affecting the estates, should invest the residue thereof as therein mentioned, so that the same might accumulate in the nature of compound interest, until the amount of such accumulation should be sufficient to discharge the principal of the mortgages and incumbrances affecting the estates. And the testator directed that, as soon as such accumulations should be sufficient fully to pay off and discharge such mortgages and incumbrances, his trustees should forthwith pay off and discharge the same. And he declared that the said *R. B. Norton*, or other the person or persons for the time being entitled for life or in tail to the estates under the limitations thereinbefore contained, should not be entitled to the receipt of any part of the rents and profits thereof, until the said mortgages and incumbrances thereon should have been fully paid off and discharged. The testator died on the 27th of August, 1875. The action was brought by *R. B. Norton* to determine various questions arising under the will. The Plaintiff attained twenty-one on the 1st of October, 1876. The testator's widow died on the 1st of May, 1878. At the time of the testator's death parts of his estates were subject to two mortgages, one for £75,000 and the other for £1000. The surplus of the income of the estates was accumulated by the trustees in accordance with the directions contained in the will, and in 1880 the mortgage for £1000 was paid off out of the accumulations. On the 23rd of January, 1884, the mortgagees for £75,000 gave notice to the Plaintiff, the trustees of the will, and *C. G. C. Norton*, to pay off, on or before the 23rd of July, 1884, the principal money and interest due on that mortgage, and that, in default of their so doing, the mortgagees intended to sell the property subject to the mortgage under their power of sale. By an order made in the action on the 15th of February, 1884, the Judge expressed an opinion that the trustees ought not to take any steps in respect of the mortgagees' notice, but should allow the notice to be acted on by them. The property subject to the mortgage was accordingly sold by the mortgagees, and

realized the sum of £67,872. The balance remaining due to the mortgagees was, under an order dated the 3rd of June, 1885, paid to them out of a fund in Court arising from accumulations of rents. In this way all the mortgages affecting the settled estates were discharged. The Plaintiff by this petition asked that he might be let into possession of the estates remaining unsold, and that the residue of the fund in Court arising from the accumulations of rents (after payment of costs) might be paid to him.

W. W. Karslake, Q.C., and *E. S. Ford*, for the Petitioner :—

The mortgages having been paid off, the Petitioner is entitled to be let into possession. The testator directed the accumulation of rents only for the purposes of paying off the mortgages; there is no direction in the will, express or implied, that the accumulation is to continue after the mortgage debts are paid, in order to recoup the inheritance. The remainderman has no equity against the tenant for life: *Tewart* v. *Lawson* (1); *Bateman* v. *Hotchkin* (2). The only distinction between *Tewart* v. *Lawson* and the present case is, that there the mortgage debts had been paid by means of sales of parts of the settled estates under orders of the Court. Here the sale was made by the mortgagees in effect with the sanction of the Court. The remainderman was present when the order giving that sanction was made.

Cozens-Hardy, Q.C., and *D. L. Alexander*, for the remainderman :—

The sale was made collusively at the request of the tenant for life.

[PEARSON, J. :—Suppose the tenant for life had sold under the power given to him by the *Settled Land Act*, 1882?]

Under sect. 53 of the Act he would have been in the position of a trustee for all the persons entitled under the settlement.

[PEARSON, J. :—Does that mean more than that a tenant for life is bound to sell with the same care and caution as a trustee should?]

In re Knatchbull's Settled Estate (3) shews that the Act was not

(1) Law Rep. 18 Eq. 490.
(2) 10 Beav. 426.
(3) 29 Ch. D. 588.

PEARSON, J. 1885 NORTON v. JOHNSTONE.

intended to alter the rights *inter se* of tenant for life and remainderman.

In *Tewart* v. *Lawson* (1) the trust was to accumulate the rents for the purpose of paying the testator's debts. In the present case the trust is to accumulate the rents until the amount of the accumulations shall be sufficient to discharge the principal of the mortgage debts.

At any rate the accumulated fund now in Court ought to be applied in recouping the inheritance; the will has declared a positive trust of that fund. If the accumulated fund had been large enough to pay the whole of the mortgage debt, surely it ought to have been employed in paying it, and the same principle applies to the fund whatever its amount.

Elphinstone, for the trustees of the will.

Karslake, in reply:—

The will contains no gift of the accumulations to the remainderman.

Aug. 11. PEARSON, J. (after stating the provisions of the will and the other facts, continued):—

It is admitted that the notice which the mortgagees gave in January, 1884, to pay off the mortgage debt, was given with the knowledge, and almost at the request of, the tenant for life. The notice was, however, brought before the Court, and the Judge expressed an opinion that the trustees ought not to take any steps, but should allow the notice to be acted on by the mortgagees. The property comprised in the mortgage was accordingly sold. The proceeds of sale were not sufficient to pay off the mortgage debt, and the deficiency was made good out of the accumulation of rents, and there now remains a surplus of the accumulated fund in Court. The result is that the estates are free from incumbrances, and, therefore, so far as the will goes, there is no longer any reason for impounding the rents. But it is urged on behalf of the remainderman, and apparently with a good deal of reason, that, inasmuch as the mortgage debt has been paid off by means of a sale

(1) Law Rep. 18 Eq. 490.

of the property, which is not what was contemplated by the testator, the accumulation of the rents ought to continue, until such a sum is obtained as is equal to the amount which was raised by the sale, and that the sum thus obtained ought to be employed in recouping the inheritance, the tenant for life receiving only the interest of it. I can, however, find nothing in the will which deals with the actual state of things. The will only says that the tenant for life is not to be entitled to the receipt of any part of the rents until the mortgages are paid off. Since the will was executed the *Settled Land Act*, 1882, has been passed, and, if the tenant for life had executed the power of selling the estates which is conferred on him by that Act, one of the purposes to which the proceeds of sale might have been applied would have been the discharge of incumbrances affecting the inheritance. I can see no reason why the proceeds of a sale by the mortgagees should not be applied in the same way. If the testator intended that the rents should be accumulated for the benefit of the remainderman, after the mortgages had been discharged, he has not said so. Having regard to the decision in *Tewart* v. *Lawson* (1), a case very like the present, I think I must hold that the tenant for life is entitled to be let into possession of the estates. And I think that the accumulated fund falls within the same rule. It is derived from an accumulation of rents, and it is not now wanted for the purpose for which it was accumulated. I have felt great difficulty in coming to a conclusion, and, whichever way I had decided the case, the decision would not have been satisfactory to me. But my *ratio decidendi* is this—the mortgage debts have been paid in a way different from that which the testator intended, but he has not provided for that event.

Solicitors for Tenant for life: *Fladgate & Fladgate.*
Solicitors for Remainderman: *Capron, Daltons, & Co.*
Solicitors for Trustees: *Whitakers & Woolbert.*

(1) Law Rep. 18 Eq. 490.

W. L. C.

PEARSON, J.
1885
Aug. 11, 12.

In re LEWIS.
FOXWELL *v.* LEWIS.

[1885 L. 1438.]

Real and Personal Estate—Conversion—Election to take Personalty as Realty—Real Estate in Lease with Option to Tenant to purchase Reversion.

A testator by his will gave his real estate and the residue of his personal estate to trustees, on trust to sell his real estate, and to convert and get in his residuary personal estate, and to stand possessed of the moneys arising from both, on trust to invest the same, and to pay the income to his wife during her life or widowhood, and, after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, and the issue of such of them as might be then dead. The testator died in 1869. The wife and two infant children survived him. There were no issue of any deceased child. Both the children died before the wife unmarried and intestate, the one who died last dying in 1876. The wife did not marry again, and she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, and the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house:—

Held, that, by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, and that on her death it descended as personalty to her next of kin.

In re Gordon (1) distinguished.

ORIGINATING SUMMONS to determine certain questions arising in relation to the will of *Richard Lewis*, who died on the 14th of November, 1869.

The testator by his will, dated the 20th of February, 1867, devised all real estate to which he might be entitled at his decease, and the residue of the personal estate to which he might be then entitled, to trustees, on trust to sell his real estate in manner therein mentioned, and to convert and get in his residuary personal estate, and to stand possessed of the moneys

(1) 6 Ch. D. 531.

arising from such real and personal estate, upon trust to invest the same as therein mentioned, and to pay to or permit his wife to receive the annual income arising therefrom, during so long as she should live and continue his widow and unmarried, and, from and after her decease or marriage again, whichever should first happen, then, as to the trust moneys and the investments thereof, upon trust for, and to be equally divided between, such of his children as might be living at the time of his decease, and, the issue of such of them as might be then dead, such issue to take its parent's share only, and, if more than one, in equal shares.

The testator left surviving him his wife and two infant children. There were no issue of any deceased child. The widow died on the 30th of April, 1885, intestate. She had not married again. The children both died before her, unmarried and intestate. The last survivor of the children died in 1876.

The only real estate which the testator had at the time of his death was a freehold house at *Wotton-under-Edge*, called *Coombe Villa*. On the 23rd of May, 1867, he had entered into an agreement with *Henry Champion* to grant him a lease of this house, for a term of twenty years from Midsummer, 1867, and this agreement gave power to the lessee, his executors, administrators, and assigns, at any time during the term, to purchase the fee simple of the property for £1600, upon giving ten days' notice of his desire so to do. This option had not been exercised.

On the death of the widow, the house remained unsold, and the question arose, whether, under the circumstances, it was to be treated as real estate or as personalty, and whether the widow's heir-at-law or her next of kin were entitled to it.

The Plaintiff, who was the surviving executor of the testator, deposed that the widow had frequently expressed to him generally her desire that the property should remain as it was, but that she never mentioned the retention of *Coombe Villa* in particular.

Dibdin, for the widow's heir, referred to *In re Gordon* (1).

Beal, for the widow's next of kin, referred to *Meek* v. *Devenish* (2).

(1) 6 Ch. D. 531.

(2) 6 Ch. D. 566.

PEARSON, J. 1885 *In re* LEWIS. FOXWELL *v.* LEWIS.

Aug. 12. PEARSON, J. (after stating the provisions of the will, continued) :—

I decided yesterday that, there being an absolute trust for sale, the real estate was converted into personalty as from the death of the testator. The two children died while they were infants, before it was possible for them to make any election to take the property as real estate. The mother by their deaths became absolutely entitled to the whole property as personalty. She has died intestate. The question is, whether her heir-at-law or her next of kin is entitled to it, *i.e.*, whether it is to be considered as having been in her hands real or personal estate. The last of the children died in 1876; the mother died in 1885. Therefore, for about nine years she has been absolutely entitled to the property, whether as realty or as personalty. There is no dispute as to the rule of law which applies to cases of this kind; the only difficulty is in the application of the rule. The rule is this: whenever real estate has been converted into personalty, or, according to the doctrine of a Court of Equity, is to be treated as having been converted into personalty, it must then descend as personalty, unless some person who is absolutely entitled to it has shewn in some way that he has elected to take it as real estate. Almost anything will be enough to shew such an intention, but there must be something. In *In re Gordon* (1), *Jessel*, M.R., thought that the fact that a person, who was absolutely entitled under the trusts of a will to the proceeds of sale of real estate, had remained in possession and received the rents for nine years, and had taken no steps to have the estate sold, was sufficient evidence of an election to take the property as real estate. In *Holder* v. *Lofts* (August, 3, 1885), I followed that decision. In that case a marriage settlement of personal estate authorized the trustees, at the request of the husband and wife, to invest in the purchase of land, which they were to sell on the same request. The income was to be paid to the wife for her life, and after her death to the husband for his life. In default of issue the property went to the wife absolutely, in case she survived the husband. In 1841 the trustees invested part of the trust funds in the purchase of

(1) 6 Ch. D. 531.

1885

In re LEWIS.

FOXWELL *v.* LEWIS.

land. The husband died in 1880. There was no issue of the marriage. The wife died intestate in 1884. The land was not sold during the husband's lifetime, the husband and wife never having requested the trustee to sell it. After the death of the husband the wife allowed it to remain unsold and received the rents of it. I held that, under those circumstances, there was sufficient evidence of an election by the wife to take the property as real estate, and that it descended to her heir. I should come to the same conclusion in the present case, but for one circumstance which distinguishes it from *In re Gordon* (1), and *Holder* v. *Lofts*. The real estate consists of a house which the testator agreed to let for a term of twenty years, expiring in 1887, and the agreement gave the tenant an option to purchase the fee simple of the property at any time before the expiration of the term. The term has not yet expired. There was therefore a very sufficient reason why no sale of the house should take place, either upon the death of the testator, or during the period for which the widow survived the children. I am afraid, therefore, that I cannot, under the circumstances, treat the fact that the widow remained in possession of the property after the death of the children as any evidence one way or the other of an election by her to take the property as real estate. I say "I am afraid" I must come to this conclusion, not from any regard to the circumstances of this particular case, but because I very much regret that it is not the law that property is always to be taken in the character in which it is actually found at the time when it ought to be distributed. I feel myself bound to hold that in the present case the property has not lost its character of personalty.

Solicitors: *Bridges, Sawtell, & Co.*, agents for *Turner & Chanter, Wotton-under-Edge.*

(1) 6 Ch. D. 531.

W. L. C.

END OF VOL. XXX.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1885, will be as follows:—

In the First Series,
28 Ch. D.

In the Second Series,
14 Q. B. D. 10 P. D.

In the Third Series,
10 App. Cas.

INDEX.

ABANDONMENT—Domicil - - 165
See DOMICIL.

ABSTRACT OF TITLE—Expense of - 42
See VENDOR AND PURCHASER. 1.

ACCOUNT—Mortgagee in possession - 336
See MORTGAGE. 3.

ACCUMULATIONS—*Tenant for Life and Remainderman—Trust for Accumulation of Rents to pay Mortgage Debts — Sale of Mortgaged Estate by Mortgagee—Right of Tenant for Life to possession.*] A testator devised his real estates (in the events which happened) to the use of the Plaintiff for life; with remainder to the use of the Plaintiff's first and other sons successively in tail male; with remainder over to the use of another person in fee. The will provided that, immediately after the death of a prior tenant for life (who died before the testator), the trustees of the will should receive the rents, and, after paying thereout the interest on the mortgages on the estates, should accumulate the residue, until the amount of the accumulations should be sufficient to discharge the principal of the mortgages. And the testator directed that, as soon as the accumulations should be sufficient to pay off the mortgages, the trustees should forthwith pay them off. And he declared that the Plaintiff, or other the person for the time being entitled for life or in tail to the estates under the limitations of the will, should not be entitled to receive any part of the rents until the mortgages had been paid off. After the testator's death the mortgagees sold those parts of the estates which were comprised in their mortgages. The proceeds of sale were not enough to pay the whole of the mortgage debts, and the balance was paid out of the accumulations of rents. A surplus of accumulations remained:—*Held*, that the tenant for life was entitled to be let into possession of the estates which remained unsold, and to have the surplus of the accumulations paid to him. NORTON *v.* JOHNSTONE - - - - - 649

—— Separate estate - - - - 183
See HUSBAND AND WIFE. 2.

ADVOWSON—*Freehold Hereditament "situate in the parish of D."—Description—Parcels—General Words—Recitals.*] An advowson, although it is a hereditament, and as being the right of presentation to a church at a particular place, "does concern land at a certain place," is but a right collateral to land, and is not aptly described as "being situate at" a particular place.—Such a description, however, may pass an advowson under certain circumstances, e.g. when upon an examination of the whole instrument a clear intention is shewn that it shall pass, or upon evidence that there is no other property in that particular place capable of being disposed of by the instrument.—*Anon.* (3 Dyer, 323 b) and *Kensey* v. *Langham* (Cas. t. Tal. 143) discussed and reconciled.—General words, although introduced for the purpose of sweeping into the assurance everything which has been omitted by mistake, apply primâ facie only to things ejusdem generis with those specifically enumerated.—G. J., tenant in tail in possession of manors, lands, and hereditaments, devised by the will of J. J., and also of the advowson of Christ Church, Doncaster, appointed to somewhat similar uses by a separate devise in the same will, by a deed which recited only the devise of the manors, &c., disentailed and limited to the use of himself in fee, "All and singular the manors, lands, hereditaments and premises devised by the said will, and also all other the lands, hereditaments, and premises whatsoever, of which he was seised as tenant in tail in possession in anywise howsoever."—By a deed of resettlement executed the next day, after reciting that he was seised of "The several manors and hereditaments comprised in the schedule subject to certain charges," and desired to settle "the same hereditaments" he assured to trustees in strict settlement, "All and singular the manors, messuages, farms, lands, and hereditaments comprised and described in the schedule," "and all other the freehold hereditaments of him the said G. J. situate in the parish of Doncaster." The schedule contained a detailed description of the parcels, but neither in it nor the deed itself was

ADVOWSON—*continued.*
there any reference to, or any provision applicable to the advowson. G. J. had property other than the advowson in the parish of D., and the advowson was not subject to any charges. — It was admitted that some portions of the disentailed property had been intentionally omitted from the resettlement:—*Held*, by North, J., that the advowson was included in the disentailing deed.—*Held*, by the Court of Appeal (affirming the decision of North, J.), that having regard to the recitals, the omission of parts of the property, and looking to the whole scope of the deed, the advowson was not by force of the general words "all other hereditaments situate in the parish of D." included in the deed of resettlement. Crompton *v.* Jarratt - - - C. A. 298

ACQUIESCENCE—Breach of trust—Adoption of investments - - - 490
See Trustee.

ADEMPTION - - - - - - 92
See Will. 3.

ADMINISTRATION—Order for—Suit by creditor
See Limitations, Statute of. [291

AFTER-ACQUIRED PROPERTY - - 500
See Settlement. 1.

—— Will speaking from death - - 50
See Will. 8.

AGENCY CHARGES—Taxation - - 1
See Solicitor. 2.

AGREEMENT—Parol—To pay part costs 114
See Solicitor. 4.

—— Separation—Reconciliation - - 143
See Husband and Wife. 5.

ALTERATION—Memorandum of association 376
See Company. 3.

AMENDMENT—Order passed and entered 239
See Practice. 6.

APPEAL—Person not a party - - 421
See Practice. 1.

—— Time for—Originating summons - 231
See Practice. 7.

APPOINTMENT - - 172, 186, 617
See Power. 1, 2, 3.

—— Members of local board - - 350
See Local Board.

ARBITRATION—Lands Clauses Act - 553
See Lands Clauses Act.

ARMY—Domicil of British subject abroad 165
See Domicil.

ARREARS—Tithe rent-charge - - 84
See Tithes.

ARREST—Debtor—Receiving order - 480
See Bankruptcy. 2.

ASSIGNMENT OF DEBT—Auctioneer's lien 192
See Auctioneer.

ATTACHMENT—Debtor—Receiving order 480
See Bankruptcy. 2.

AUCTIONEER—*Assignment of Debt—Lien—Marshalling—Two Funds, one subject to Lien, the other not.*] The Defendants were auctioneers and had sold for a customer a brewery, and part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connection

AUCTIONEER—*continued.*
with the sale: they had also in their hands the balance of the price of some furniture sold by them for the same customer. The Plaintiff was a creditor of the Defendants' customer, and he by letter charged the proceeds of the sale of the brewery in favour of the Plaintiff. The Defendants wrote to the Plaintiff acknowledging the receipt of the letter of charge. The Defendants afterwards paid their customer the balance of the price of the furniture, and appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges:—*Held*, first, that the letter of charge and the Defendants' acknowledgment thereof amounted to a good equitable assignment in favour of the Plaintiff:—Secondly, that the Defendants, as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands:—Thirdly, that the Defendants were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, and were not bound to take payment of their charges out of the price of the furniture in order to enable the Plaintiff to obtain payment of his charge, and that the doctrine of marshalling did not apply. Webb *v.* Smith - - - - - C. A. 192

BANKRUPTCY—*Order and Disposition of Bankrupt "in his trade or business"—Shares in Incorporated Company—Chose in Action—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-s. iii.*] B. and T. were partners as stockbrokers, and their practice was from time to time to buy shares in the way of their business, and to obtain advances on them by equitable mortgage or otherwise for the purposes of their business, and for convenience the shares were generally taken in the name of B., who held them as trustee for the partnership. B. deposited the certificates together with a blank transfer of railway shares, bought with partnership moneys, and registered in his name, with a bank to secure moneys due to the bank from the firm. B. and T. became bankrupt, and no notice of the deposit was given to the railway company until after the commencement of the bankruptcy:—*Held*, that as the shares were bought with partnership moneys, and intended to be used for the purposes of the partnership business, they were at the time of the bankruptcy in the order and disposition of B. in his business, for that the business of the partnership was B.'s business, although another person was associated with him in it; and further, that as no notice of the deposit had been given to the railway company, the shares were in the order and disposition of B., by the consent and permission of the true owner, under such circumstances that B. was the reputed owner of them:—*Held*, therefore, that the shares must pass to the trustee in bankruptcy, unless they were taken out of the reputed ownership clause, Bankruptcy Act, 1883, s. 44, sub-s. iii., by the proviso excluding choses in action from the operation of the clause.—*Held*, by Cotton and Lindley, L.JJ., dissentiente Fry, L.J., that the shares were not choses in action within the meaning of the proviso, and that they passed to the trustee.—Order of Bacon, V.C., affirmed. Colonial Bank *v.* Whinney C. A. 261

BANKRUPTCY—*continued.*

2. —— *Receiving Order—Attachment—Arrest of Debtor between Date and signing of Order—Bankruptcy Act*, 1883, *s.* 9—*Bankruptcy Rules*, 1883, *r.* 153; *Appendix, Forms* 29 *and* 30.] Having regard to the terms of sect. 9 of the Bankruptcy Act, 1883, as to the effect of a receiving order in protecting a debtor from arrest, the order must be deemed to have been "made" on the day it was pronounced, and therefore as protecting the debtor as from that day.—Therefore, where a debtor had been arrested under an order of the Chancery Division made after the date of a receiving order pronounced before, but not drawn up and signed by the Registrar (Bankruptcy Rules, 1883, r. 153, Appendix, Forms 29 and 30) until after the arrest, he was ordered to be discharged, notwithstanding that he had by his counsel submitted to the order of attachment.—Order of Kay, J., affirmed. *In re* MANNING [C. A. 480

—— Forfeiture on—Re-assignment - 623
See SETTLEMENT. 3.

—— Husband of executrix—Action—Costs 24
See PRACTICE. 4.

BANKRUPTCY RULES, 1883, r. 153; Appendix, Forms 29 and 30 - - - 480
See BANKRUPTCY. 2.

BENEFICE—Mortgage—13 Eliz. c. 20 - 520
See MORTGAGE. 1.

BILL OF COSTS - - - - 441
See SOLICITOR. 3.

—— Promise to pay lump sum - - 114
See SOLICITOR. 4.

BILL OF EXCHANGE—*Conflict of Law—Foreign Indorsement — Company — Winding-up — Liquidator—Costs.*] Bills of exchange were drawn in France by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England:—*Held*, that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law.—Costs of successful claims in a winding-up were not given against the liquidator personally, but out of the assets. *In re* MARSEILLES EXTENSION RAILWAY AND LAND COMPANY. SMALLPAGE'S AND BRANDON'S CASES 598

BLANK—In will - - - - 390
See WILL. 1.

BOND—Mortgage—Bond by sureties - 291
See LIMITATIONS, STATUTE OF.

BORROWING POWERS - - - 434
See BUILDING SOCIETY.

BRITISH SUBJECT—Resident abroad—Guardian
See INFANT. [324

BUILDING ESTATE—Investment—Trustees 490
See TRUSTEE.

BUILDING LINE - - - - 350
See LOCAL BOARD.

BUILDING SOCIETY—*Borrowing Power—"Deposits on Loans" — Winding-up — Priority of Depositors—6 & 7 Will. 4, c. 32.*] One of the rules of a benefit building society, formed under the Act 6 & 7 Will. 4, c. 32, provided that the

BUILDING SOCIETY—*continued.*

society "is established for the purpose of raising by monthly subscriptions and deposits on loans a fund to make advances to members of the value of their shares," &c. Another rule provided that the directors should meet at specified times, "for the purpose of conducting the business of the society." A third rule provided that at the end of every five years a general account of the affairs of the society should be prepared, shewing the gross receipts and expenditure and liabilities, and that "if on taking the accounts there appears to be a deficiency of income, by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and be paid forthwith by such monthly or quarterly instalments as the directors shall determine":—*Held*, that the first rule authorized the borrowing of money from persons not members of the society; that the second rule enabled the directors to exercise the power; and that the third rule did not enable the directors to pledge the individual credit of the members to the lenders of money to the society, but that, even if it did, and was thus ultrà vires, as being inconsistent with the nature of a building society under the Act, that rule might be rejected, leaving the borrowing power unaffected.—*Held*, that the lenders of money to the society were entitled, on its being wound up, to be paid out of the assets in priority to any of the members.—Decision of Kay, J., affirmed. *In re* MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY - - C. A. 434

CASES—*Ames* v. *Cadogan* (12 Ch. D. 868) discussed - - - - 172
See POWER. 2.

—— *Ancona* v. *Waddell* (10 Ch. D. 157) distinguished - - - - 623
See SETTLEMENT. 3.

—— *Anon.* (3 Dyer, 323 b) discussed - 298
See ADVOWSON.

—— *Attree* v. *Hawe* (9 Ch. D. 337) distinguished
See CHARITY. [544

—— *Batsford* v. *Kebbell* (3 Ves. 363) distinguished - - - - 507
See WILL. 10.

—— *Bunn, In re* (16 Ch. D. 47) observed upon
See WILL. 10. [507

—— *Clark* v. *Browne* (2 Sm. & Giff. 524) not followed - - - - 92
See WILL. 3.

—— *Cockrill* v. *Sparkes* (1 H. & C. 699) distinguished - - - - 291
See LIMITATIONS. STATUTE OF.

—— *Ewer* v. *Hayden* (Cro. Eliz. 476, 658) followed - - - - 50
See WILL. 8.

—— *Fearnside* v. *Flint* (22 Ch. D. 579) distinguished - - - - 291
See LIMITATIONS, STATUTE OF.

—— *Gordon, In re* (6 Ch. D. 531) distinguished
See ELECTION. [654

—— *Harris, In re* (15 Ch. D. 561) distinguished
See CHARITY. [544

CASES—*continued.*

—— *Higginson* v. *Hall* (10 Ch. D. 235) dissented from - - - - - 189
See Practice. 2.

—— *Jervis* v. *Lawrence* (22 Ch. D. 202) not followed - - - - 544
See Charity.

—— *Kensey* v. *Langham* (Cas. t. Tal. 143) discussed - - - - 298
See Advowson.

—— *Knapp* v. *Williams* (4 Ves. 430, n.) followed
See Charity. [544

—— *Loane* v. *Casey* (2 W. Bl. 965) followed 15
See Executor.

—— *Lloyd* v. *Lloyd* (Law Rep. 2 Eq. 722) distinguished - - - - 623
See Settlement. 3.

—— *Megson* v. *Hindle* (15 Ch. D. 198) distinguished - - - - 110
See Will. 4.

—— *Moore* v. *Moore* (29 Beav. 496) distinguished
See Will. 3. [92

—— *Sottomaior, In re* (Law Rep. 9 Ch. 677) dissented from - - - - 320
See Lunatic.

—— *Stanford* v. *Roberts* (26 Ch. D. 155) approved - - - - 28
See Solicitor. 5.

—— *Sutton* v. *Sutton* (22 Ch. D. 511) distinguished - - - - 291
See Limitations, Statute of.

—— *Swinbanks, Ex parte* (11 Ch. D. 525) distinguished - - - - 249
See Solicitor. 1.

—— *Touche* v. *Metropolitan Railway Warehousing Company* (Law Rep. 6 Ch. 671) considered - - - - 57
See Husband and Wife. 4.

—— *Vize* v *Stoney* (2 D. & Wal. 659; 1 D. & War. 337) observed upon - - 507
See Will. 10.

—— *White* v. *Chitty* (Law Rep. 1 Eq. 372) distinguished - - - - 623
See Settlement, 3.

—— *Williamson* v. *Williamson* (Law Rep. 9 Ch. 729) distinguished - - - 404
See Landlord and Tenant.

—— *Wilson* v. *Coxwell* (23 Ch. D. 764) overruled
See Executor. [15

CESTUI QUE TRUST—Right of action—Breach of covenant - - - - 57
See Husband and Wife. 4.

CHAMBERS—Business in - - - 541
See Practice. 8.

CHANCERY DIVISION—Action for sum below £10 - - - - - 387
See Practice. 3.

CHARITY—*Will—Mortmain—9 Geo. 2, c. 36—Assignment of Harbour Duties—Interest in Land.*] A bond by Harbour Commissioners, in form prescribed by their Act, assigning the duties arising by virtue of the Act (which directed the application of such duties: 1st, in payment of the costs and expenses of obtaining the Act; 2, in payment of the interest of moneys advanced for defraying

CHARITY—*continued.*

such expenses; 3, in payment of the interest of moneys borrowed under the Act; 4, in defraying working expenses; and, 5, in payment of principal moneys borrowed under the Act), is an interest in, or affecting land within 9 Geo. 2, c. 36, and therefore cannot be given by will for charitable purposes.—*Knapp* v. *Williams* (4 Ves. 430, n.) followed; *Attree* v. *Hawe* (9 Ch. D. 337) and *In re Harris* (15 Ch. D. 561) distinguished; *Jervis* v. *Lawrence* (22 Ch. D. 202) not followed. *In re* Christmas. Martin *v.* Lacon - - 544

CHILD—Illegitimate - - - 110
See Will. 4.

COLLUSION—Judgment obtained by - 421
See Practice. 1.

COMITY OF NATIONS—Infant resident abroad—Guardian - - - - 324
See Infant.

COMPANY — *Contract — Running Contract — Charge on Moneys payable under the Contract—Winding-up of contracting Company—Set-off—Salvage Money—Moneys payable under concurrent Contracts—Notice—Mutual Credit—Bankruptcy Act*, 1869 (32 *& 33 Vict. c.* 71), *s.* 39.] By the terms of a contract between the Commissioners of Sewers and a wood paving company, the company were to pave a particular street called Victoria Street, and the Commissioners were to pay 60 per cent. of the moneys due a month after the engineer certified the works to be complete; 30 per cent. within three months afterwards; and 10 per cent. at the expiration of two years. During the two years the company were to keep the wood surface of the roadway in repair, and if, before the expiration of the two years, the Commissioners should give them notice, the company were also to keep the roadway in repair for fifteen years upon being paid for the same at the annual rate of 6*d.* per square yard. The Commissioners were to be at liberty to retain from time to time "out of any money payable by them to the contractors," an amount equal to the above annual charge, by way of security; and in the event of failure by the company to perform the contract, the moneys retained were to be forfeited, and to be held by the Commissioners as liquidated damages for the default; and it was provided that whenever "according to the terms of this contract," any money should be due from the company to the Commissioners for damages or otherwise, the Commissioners might either sue for such money or deduct or set off the same against any money due from them to the company.—The contract being dated on the 22nd of September, 1882, the company on the 15th of November, 1882, gave to L. and C., timber merchants, a charge on all their interest in the contract to secure a debt for goods sold and delivered; and on the 9th of December, 1882, notice of this charge was given to the Commissioners.—On the same 9th of December, 1882, but after the notice, the company presented a petition for a winding-up order, and on the 12th and 16th of December the provisional official liquidator was empowered and ordered to complete the contract and to obtain the necessary timber on security of the moneys to be received subject to L. and C.'s charge. On the 13th of January, 1883, the winding-up order was made: on the 29th of January

COMPANY—*continued.*
the liquidator, having completed the work, sent in a claim to the Commissioners, and on the 8th of March, 1883, the engineer certified the work to be complete. On the 19th of March, 1883, the Commissioners sent to the liquidator a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1*s.* a square yard, which the Commissioners considered they would have to pay for the repairs, and the 6*d.* a square yard provided for by the agreement. They also claimed to set off damages accrued and anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of any of these contracts accrued before the 27th of January, 1883. On the 25th of May, 1883, the Commissioners served the company (in liquidation) with formal notice to repair for fifteen years from the 8th of March, 1885:—*Held*, that the liquidator was not entitled to a first charge on the moneys payable under the contract for the cost of completing the work incurred by him since the winding-up.—Decision of Bacon, V.C., reversed.—*Held*, further, that the chargees, L. and C., were entitled to a charge on 90 per cent. of the moneys payable under the contract (subject as above) undiminished by any retainer or set-off by the Commissioners either under the Victoria Street contract or otherwise.—Decision of Bacon, V.C., affirmed.—*Held*, further, that the Commissioners might prove for their cross-claim under the contract of the 22nd of September, 1882.—Decision of Bacon, V.C., affirmed.—*Held*, further, that the Commissioners were not entitled to retain any moneys due under the contract of the 22nd of September, 1882, in respect of moneys due under any of the concurrent contracts.—Decision of Bacon, V.C., affirmed. *In re* Asphaltic Wood Pavement Company. Lee & Chapman's Case [C. A. 216

2. —— *Directors' Fees—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 7—*Priorities of Debts.*] In a company where directors were obliged to be members:—*Held*, that a director's unpaid fees were debts due to him in his character of member, and to be postponed to outside creditors. *In re* Leicester Club and County Racecourse Company. *Ex parte* Cannon - - 629

3. —— *Memorandum of Association—Preference and Ordinary Shares—Special Resolutions altering Appropriation of Revenue*—25 & 26 *Vict. c.* 89, *s.* 12—*Ratification by Shareholders—Rights of Shareholders under original Contract.*] The memorandum of association of a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), stated that a portion of the shares were to have a right of receiving a dividend by preference to the other shares, and that the preference shares should have a right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and to one-fifth of the remainder of the net revenue after a deduction of a sum sufficient for paying 7 per cent. per annum on the ordinary shares; and also that those shares should have a right to the rest of the dividend, whatever it might be, up to 7 per cent. after paying 7 per cent. to the preference shares and to four-fifths of the remainder of

COMPANY—*continued.*
the net revenue, after deduction of a sum sufficient to pay the dividends to the preference and ordinary shares.—The directors applied the profits of the company in substantial accordance with the provisions in the articles of association till November, 1872, when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and which provided for the redemption of shares out of the surplus profits, and they were acted upon without any objection being raised to them by any of the members of the company till July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association was restored;—*Held* (affirming the decision of Kay, J.), that the resolutions of 1872 were not valid, as they altered a condition in the memorandum of association in contravention of sect. 12 of the Companies Act, 1862:—*Held*, also, that even if the resolutions of 1872 would be valid if ratified by every member of the company, there was no evidence on which the Court, acting as a jury, ought to infer that every member of the company had ratified such resolutions with full knowledge of what had been done. Ashbury *v.* Watson - - - - - - C. A. 376

4. —— *Paid-up Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Numbers of Shares.*] A contract to issue fully paid-up shares for a consideration other than money, registered under the Companies Act, 1867, sect. 25, need not specify the numbers of the shares. *In re* Delta Syndicate, Limited. *Ex parte* Forde - - 153

—— Costs—Liquidation - - - 598
See Bill of Exchange.

—— Railway company - - - 634
See Railway Company.

COMPENSATION—Incumbent of benefice - 520
See Mortgage. 1.

COMPULSORY PURCHASE—Powers of vestry
See Vestry. [642

CONDITION—Bill of costs - - - 441
See Solicitor 3.

—— Life estate—Settled Land Act - 161
See Settled Land Act. 4.

—— Option of purchase - - - 203
See Will. 7.

CONFLICT OF LAWS—Bill of exchange—Indorsement - - - - 598
See Bill of Exchange.

CONTINGENT APPOINTMENT - - 186
See Power. 1.

CONTRACT—Company—Charge on money payable - - - - - 216
See Company. 1.

—— Married woman - - - - 169
See Husband and Wife. 1.

CONVERSION—Real and personal estate—Election - - - - - - 654
See Election.

COPYHOLD—*Purchase of several distinct Tenements under one Disposition—Right to split Admittance—Fines—Special Custom—Evidence.*] There is no general copyhold law that, in manors

COPYHOLD—*continued.*
in which a fine is only payable on the first admittance of a tenant, a purchaser of several distinct copyhold tenements under one disposition—whether a will, or surrender, or otherwise—is entitled as of right to split his admittances, i.e., is entitled to compel the lord of the manor to admit him to any one or more of such several tenements, and to take admittance to the others at any subsequent time, as and when he pleases.—A special custom in a manor, that a purchaser of several distinct copyhold tenements under one disposition, must take admittance to all at one and the same time, and pay one general fine in respect of all, is good.—Such a special custom may be evidenced by a uniform course of practice or usage in the manor for a number of years, although it does not otherwise appear either on the Court rolls, or in any custumal or other record, of the manor. JOHNSTONE *v.* EARL SPENCER - 581

COSTS—Bill of costs.
See Cases under SOLICITOR.
—— Liquidator in winding-up - - 598
See BILL OF EXCHANGE.
—— Married woman - - - 159
See HUSBAND AND WIFE. 3.
—— Practice - - - - - 24
See PRACTICE. 4.
—— Vendor and purchaser - - 42
See VENDOR AND PURCHASER. 1.
COUNSELS' FEES - - - 1
See SOLICITOR. 2.
COUSINS - - - - - 512
See WILL. 2.
COVENANT—Debt under—Retainer - 15
See EXECUTOR.
—— Lease and underlease - - - 404
See LANDLORD AND TENANT.
—— Right of action—Separation deed - 57
See HUSBAND AND WIFE. 4.
—— To settle after-acquired property - 500
See SETTLEMENT. 1.
CROWN—Service of—Domicil - - 165
See DOMICIL.
CUSTOM—Copyhold - - - - 581
See COPYHOLD.

DAMAGES—Retainer - - - 15
See EXECUTOR.
DEATH—Before payment - - - 512
See WILL. 2.
DEED—Deposit of - - - - 396
See MORTGAGE. 2.
—— Not in vendor's possession - - 42
See VENDOR AND PURCHASER. 1.
DELIVERY—Bill of costs - - - 441
See SOLICITOR. 3.
DEPOSITS—Loan to building society - 434
See BUILDING SOCIETY.
DIRECTOR—Fees - - - - 629
See COMPANY. 2.

DOMICIL—*Abandonment—Acquired Domicil—British Subject in Military Service of Crown.*] The rule that a British subject does not, by entering into and remaining in the military service of the Crown, abandon the domicil which he had when he entered into the service, applies to an acquired domicil as well as to a domicil of origin.—An infant, whose father was then living in Jersey, where he had acquired a domicil in place of his English domicil of origin, obtained a commission in the British army in 1854 and joined his regiment in England. He served with the regiment in different parts of the world, and ultimately, in 1863, he died in Canada, where he then was with the regiment. He had in the meantime paid occasional visits to Jersey while on leave:—*Held*, that he retained his Jersey domicil at the time of his death. *In re* MACREIGHT. PAXTON *v.* MACREIGHT - - - - 165

EJUSDEM GENERIS—Bequest of furniture 92
See WILL. 3.

ELECTION—*Real and Personal Estate—Conversion—Election to take Personalty as Realty—Real Estate in Lease with Option to Tenant to purchase Reversion.*] A testator by his will gave his real estate and the residue of his personal estate to trustees, on trust to sell his real estate, and to convert and get in his residuary personal estate, and to stand possessed of the moneys arising from both, on trust to invest the same, and to pay the income to his wife during her life or widowhood, and, after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, and the issue of such of them as might be then dead. The testator died in 1869. The wife and two infant children survived him. There were no issue of any deceased child. Both the children died before the wife unmarried and intestate, the one who died last dying in 1876. The wife did not marry again, and she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, and the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house:—*Held*, that by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, and that on her death it descended as personalty to her next of kin.—*In re Gordon* (6 Ch. D. 531) distinguished. *In re* LEWIS. FOXWELL *v.* LEWIS - - - - - 654

ESTATE TAIL—Title of dignity - - 136
See SETTLED LAND ACT, 6.

EVIDENCE—Special custom of manor - 581
See COPYHOLD.

EXECUTOR—*Administration—Right of Retainer—Assets received or paid into Court after Death of Executor—Right of Representatives of Executor—Debt under Covenant—Arbitrary Damages.*] An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into Court during his lifetime.—If an execu-

EXECUTOR—*continued.*
tor asserts in his lifetime a right of retainer, but dies without having exercised it, his representatives may exercise that right for the benefit of his estate only as to anything which came into the actual possession or under the actual control of their testator, or which was paid into Court during his lifetime.—*Wilson* v. *Coxwell* (23 Ch. D. 764), unless restricted in this way, must be treated as overruled.—Claims by an executor for breach of a covenant to assign a policy, and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and may therefore, on the authority of *Loane* v. *Casey* (2 W. Bl. 965), be retained. *In re* Compton. Norton *v.* Compton - C. A. 15

FEES—Directors of company - - 629
See Company. 2.

FINE—Copyhold - - - - 581
See Copyhold.

FORECLOSURE - - - - 574
See Mortgage. 4.

FOREIGN BILL OF EXCHANGE - - 598
See Bill of Exchange.

FORFEITURE—Bankruptcy — Estate of tenant for life - - - - 605
See Settled Land Act. 5.

—— Bankruptcy—Condition in settlement
See Settlement. 2, 3. [119, 623

FURNITURE — Bequest of — Things ejusdem generis - - - - 92
See Will. 3.

GENERAL ORDER OF AUGUST, 1882, Rule 2; Schedule I., Part I., Rule 11 - 28
See Solicitor. 5.

GENERAL WORDS—Ejusdem generis - 298
See Advowson.

GUARDIAN—Infant resident abroad - 324
See Infant.

HARBOUR DUTIES—Assignment—Mortmain
See Charity. [544

HEIRLOOMS—Settled Land Act 102, 127, 136
See Settled Land Act. 1, 2, 6.

HUSBAND AND WIFE—*Separate Estate—Contract — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4.] The contract entered into by a married woman "to bind her separate property," referred to in sect. 1, sub-sect. 4, of the Married Women's Property Act, 1882, is a contract entered into at a time when she has existing separate property.—If the married woman commits a breach of such a contract, and a judgment is recovered against her for the breach, the judgment can be enforced against any separate property which she then has.—But sect. 1, sub-sect. 4, does not enable a married woman who has no existing separate property to bind by a contract any separate property which she may possibly thereafter acquire. *In re* Shakespear. Deakin *v.* Lakin - - 169

2. —— *Separate Estate—Restraint on Alienation and Anticipation—Accumulations.*] A testator directed surplus income of real and personal estate, after providing an annuity, to be accumulated during the life of his wife, and after her death he gave the capital to his children: he directed that the shares of his daughters should be for their separate use, without power of alienation or anticipation during the wife's life:—*Held*, that his married daughters during the life of their mother were entitled to receive only the income of invested income. *In re* Spencer. Thomas *v.* Spencer - - - - - 183

3. —— *Separate Estate—Restraint on Anticipation — Costs — Proceedings improperly instituted.*] A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted (without a next friend) against the trustees proceedings in the course of which she took out a summons which was refused:—*Held*, that the restraint on anticipation did not prevent the Court from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income. *In re* Andrews. Edwards *v.* Dewar - 159

4. —— *Separation Deed—Covenant with Trustees to maintain Children—Right of Child to sue—Cestui que trust—Stranger suing on Covenant—Practice — Action — Parties — Mistake—Amendment—Rules of Supreme Court*, 1883, *Order xvi., r.* 2.] To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, the third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract.—By a deed of separation between husband and wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, and provided also that the covenants by the trustees were duly observed and performed: provided, also, that the two youngest daughters should live at such place (being reasonable and proper for the purpose) as the husband should direct, and should be maintained and educated at his expense, the husband and wife to have all reasonable access to them. And the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife and the two eldest daughters, and against all molestation by them, and that the wife would not take any proceedings against the husband for alimony, except as aforesaid; and that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, and the place at which they should live, and would permit them, if they so desired, and without any interference on the part of the wife, to accept any invitation of the husband to reside with him.—On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband and the trustees of

HUSBAND AND WIFE—*continued.*
the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs, and Bacon, V.C., gave a judgment for enforcing the covenant:—*Held*, on appeal, that upon the construction of the deed, the Plaintiff was not in the position of cestui que trust under the covenant so as to entitle her to maintain the action, but liberty was given to her, under the Rules of the Supreme Court, 1883, Order XVI., r. 2, to amend the writ, by adding the trustees, the wife, and the other daughters, or any of them, as Plaintiffs—*Touche* v. *Metropolitan Railway Warehousing Company* (Law Rep. 6 Ch. 671) considered.—The trustees refusing to be joined as co-Plaintiffs, the statement of claim was amended by making the wife a co-Plaintiff:—*Held*, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue she could sue in equity.—After the separation deed the husband committed adultery, and a decree was made for judicial separation, giving the custody of the two youngest daughters to the wife. After this the wife applied for increased alimony, which was granted by the President, but his decision was reversed on appeal (7 P. D. 168), both the arguments and the judgment of the Court of Appeal proceeding on the footing (though the Court did not expressly decide the point) that the husband remained liable under the deed to pay for the maintenance and education of the two youngest daughters. He now contended that his covenant was put an end to by the custody of the youngest daughters being given to his wife:—*Held*, that he was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued, and at the same time to insist that his liability under it had determined, and the appeal was ordered to stand over, with liberty to the wife to apply to the Divorce Court for increased alimony, if she should be so advised. GANDY *v.* GANDY - - - - - - C. A. 57

5. —— *Separation Deed — Reconciliation — 20 & 21 Vict. c.* 85, *s.* 25.] A husband and wife when before the Divorce Court agreed that if judicial separation was decreed the wife should be permitted to enjoy during her life certain furniture. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation:—*Held*, in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed:—*Held*, that, as the wife was entitled to the furniture during separation only, she took nothing under 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by a wife during separation. NICOL *v.* NICOL 143

—— Action by executrix and her husband—Costs - - - - - - 24
See PRACTICE. 4.

—— Married Women's Property Act—Wife suing as feme sole - - - - 418
See PRACTICE. 5.

ILLEGITIMATE CHILD - - - 110
See WILL. 4.

IMPROVEMENTS—Settled Land Act - 102
See SETTLED LAND ACT. 1.

INCORPOREAL HEREDITAMENT — Title of dignity - - - - 136
See SETTLED LAND ACT. 6.

INCUMBENT — Compensation on retirement — Mortgage - - - - 520
See MORTGAGE. 1.

INCUMBRANCES—Discharge of - - 127
See SETTLED LAND ACT. 2.

INDORSEMENT—Foreign bill of exchange 598
See BILL OF EXCHANGE.

INFANT —*Guardian—Nationality—Jurisdiction —Grandchild born Abroad of natural-born British Subject—Status of British Subject—*7 *Anne, c.* 5—4 *Geo.* 2, *c.* 21, *s.* 1—13 *Geo.* 3, *c.* 21, *s.* 1—*International Comity.*] If an infant be born abroad whose paternal grandfather was a natural-born British subject, the Court has jurisdiction to appoint a guardian of such infant, although the infant is resident abroad and has no property in this country.—A Frenchwoman, who was the mother of such an infant, and entitled by the law of France to the status of natural guardian of the infant, was not a person who would have been appointed guardian if she and the infant had been domiciled in England, and she had brought proceedings in the French Courts for the appointment of guardians, which proceedings had been directed to stand over until it should be ascertained what course the English Courts would adopt:—*Held*, by Kay, J., that this was a case in which the English Court should exercise its jurisdiction; and a guardian of the infant appointed accordingly; and *held* by the Court of Appeal, that under the circumstances the decision of the Court below was right. *In re* WILLOUGHBY (AN INFANT) [C. A. 324

—— Next friend - - - - 189
See PRACTICE. 2.

INJUNCTION — Trade name — Telegraphic address - - - - - 156
See TRADE NAME.

INQUIRY—Commencement of lunacy - 320
See LUNATIC.

INSOLVENCY—New South Wales—Forfeiture
See SETTLEMENT. 2. [119

INTENTION—Exercise of power - - 617
See POWER. 3.

INTEREST—Mortgage—Tenant for life - 614
See WILL. 6.

INTERIM INCOME—Vesting - - 507
See WILL. 10.

INVESTMENT—Liability of trustees - 490
See TRUSTEE.

JUDGMENT—Obtained by collusion - 421
See PRACTICE. 1.

JUDICIAL SEPARATION—Marriage settlement —After-acquired property - 500
See SETTLEMENT. 1.

JURISDICTION — Appointment of guardian to infant abroad - - - 324
See INFANT.

JURISDICTION—*continued.*
—— High Court of Justice—Action for sum below £10 - - - - 387
See PRACTICE. 3.

LANDLORD AND TENANT—*Underlease—Agreement that Underlease shall contain the same Covenants as original Lease—Covenant against Assignment.*] The Plaintiff, who was lessee of part of the property of a hospital, agreed with the Defendant to grant him an underlease, "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the Plaintiff, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible), together with such other covenants, clauses, and provisoes as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute relating to the demised premises should arise between the lessee and any other tenant of the hospital, it should be referred to the arbitration of the hospital; (2) that the lessee, his executors, administrators, or assigns would not assign or sublet without the licence of the hospital; (3) that all demises and assignments of the demised premises should be prepared by the solicitors of the hospital:—*Held*, by Pearson, J., and by the Court of Appeal, that the covenants in the original lease were not to be taken as models and inserted into the underlease with the names of the underlessor and underlessee substituted for the names of the original lessors and lessee respectively, but that the Plaintiff was entitled to have them inserted without modification, so as to bind the underlessee to refer disputes with tenants of the hospital to the arbitration of the hospital, not to assign or underlet without the consent of the hospital, and to have his demises and assignments prepared by the solicitors of the hospital.—*Williamson* v. *Williamson* (Law Rep. 9 Ch. 729) distinguished. HAYWOOD *v.* SILBER **C. A. 404**

LANDS CLAUSES ACT, *ss.* 18, 19, 23, 25, 27, 28, 30—*Notice to treat—Service on Occupier of Part of Premises—Notice adopted by Owner—Validity of Service—Reference to Arbitration—Arbitrator neglecting or refusing to act—Power of other Arbitrator to proceed ex parte.*] Where arbitrators have been appointed under sect. 25 of the Lands Clauses Act, 1845, and one arbitrator refuses or neglects for seven days to concur in the appointment of an umpire, the other arbitrator has power, under sect. 30 of the Act, to proceed ex parte to make an award, and the previous appointment of an umpire is not in such a case a condition precedent to the ex parte proceedings.—A corporation, three days before the expiration of their compulsory powers, without making any attempt to discover and serve the owner of the property, served a notice to treat on an occupier of part of the premises comprised in the notice to treat, who was the agent of the owner for the management of his property. The occupier took it the same day to the solicitor of the owner, and also wrote to the owner; but it did not appear that, as a matter of fact, the notice came to the hands of the owner before the three days had expired. The owner, however, after the expiration of the three days gave a counter notice under sect. 92

LANDS CLAUSES ACT—*continued.*
requiring the corporation to take the whole of his property. This notice he subsequently withdrew, and required the corporation to proceed with the purchase of the land specified in their notice to treat, which they declined to do:—*Held*, that the service of the notice to treat was irregular and invalid, and that the owner could not, by his subsequent adoption of the notice, cure the irregularity and compel the corporation to proceed with it.—The conditions necessary for service of a notice to treat discussed. SHEPHERD *v.* CORPORATION OF NORWICH - - - - 553
—— Costs—Solicitors Remuneration Act 28
See SOLICITOR. 5.
—— Payment out of Court - - - 541
See PRACTICE. 8.

LAPSE - - - - - - 234
See WILL. 5.

LARCH TREES - - - - 485
See TIMBER.

LEASEHOLD—Title to—Peppercorn rent 344
See VENDOR AND PURCHASER. 2.

LEAVE OF COURT—Settled Land Act - 102
See SETTLED LAND ACT. 1.

LIEN—Auctioneer - - - - 192
See AUCTIONEER.

LIMITATION OF USER—Trade-mark - 454
See TRADE-MARK. 1.

LIMITATIONS, STATUTE OF—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Bond by Sureties for Payment of Mortgage Debt—Rules of Supreme Court*, 1883, *Order* LV., *r.* 10—*Order for Administration at Suit of Creditor.*] In 1867 T. P. mortgaged an estate to L. & A. for £1000, and at the same time E. P. and C. P. gave to L. & A. a joint and several bond in the penal sum of £400 reciting that the £1000 had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof a bond conditioned for payment of £200 and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrear, and in 1880 the mortgagees entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. & A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874. Bacon, V.C., without giving any opinion on this question, dismissed the summons under the discretion given by Order LV., rule 10, on the ground that a disputed debt ought not to be tried on summons:—*Held*, by the Court of Appeal, that as there were no facts in dispute the Vice-Chancellor ought to have decided the question of law on the summons:—*Held*, further, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property

LIMITATIONS, STATUTE OF—*continued.*

Limitation Act, 1874, sect. 8:—*Held*, further, that if remedy on the bond had been barrable by the lapse of twelve years under that section, the payments of interest by the mortgagor would have prevented the bar:—*Held*, therefore, that L. & A. were entitled to rank as creditors against the estate of E. P., and that if his representatives did not admit assets, an administration order must be made.—*Sutton* v. *Sutton* (22 Ch. D. 511), *Fearnside* v. *Flint* (22 Ch. D. 579), and *Cockrill* v. *Sparkes* (1 H. & C. 699), distinguished. *In re* Powers. Lindsell *v.* Phillips - **C. A. 291**

LIQUIDATOR—Costs - - - **598**
See Bill of Exchange.

LOCAL BOARD—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 158; *Sched. I., rr.* 2, 9; *Sched. II., Part I., r.* 65; *Part II., r.* 2—*Quorum—Casual Vacancy—Lapse of Board—Informality—Building Line—Acquiescence.*] Several members of a local board constituted under the Public Health Act, 1875, and consisting of nine members, resigned, so that the quorum of three required by Sched. I., r. 2, was not left. The two remaining members proceeded to fill up the vacancies. The board as thus constituted prescribed a building line under sect. 155 of the Act:—*Held*, by Pearson, J., that, as the resignations reduced the number of members to less than a quorum, the board had lapsed, that the two remaining members could not fill up the vacancies, that there was therefore no board, that the building line was therefore not well prescribed, and that Sched. I., rule 9, to the Act did not cure the defect.—*Held*, by the Court of Appeal, that the filling up of vacancies was "business" within the meaning of Sched. I., rule 2, that the two members were not competent to transact it, and that the new members therefore were not duly elected, but that by Sched. I., rule 9, the objection to the building line, founded on the fact that some of the members of the board were not duly elected, was removed.—The Defendants being about to pull down a school and erect a new one, submitted plans to the local board. The local board objected to the plans, giving as a reason that they violated a by-law, which obliged a person laying out a new street to leave it of a certain width. This by-law was not applicable, as South Lane, on which the school fronted, was not a new street. The Defendants disregarded the objection, commenced their works on the 5th of January, 1885, laid the foundations of the main wall towards South Lane on the 12th, and proceeded rapidly with the erection of it. On the 22nd of January, the local board prescribed a building line which did not interfere with the main wall, but would prevent the erection of certain annexes not then commenced, lying between South Lane and the main walls, which annexes were shewn on the plans laid before the board. The Defendants had ground enough to allow of the annexes being erected elsewhere. The Defendants proceeded with the annexes, and the board brought their action to restrain them from building beyond the line, and to compel them to pull down what they had built beyond it:—*Held*, that where a building is taken down to be rebuilt, a building line may be prescribed under sect. 155, for any portion

LOCAL BOARD—*continued.*

of it which has not been commenced, although other portions have been commenced, unless what has been commenced necessarily involves as a matter of construction a projection beyond the line afterwards prescribed, and that here no such necessity existed, as the annexes could be erected elsewhere. That the commencement of the main building therefore did not preclude the board from laying down a line which would prevent the erection of the annexes which had not then been commenced.—*Held*, also, that as the notice given by the board, though ineffectual for the purpose of empowering them to pull down the erection under sect. 158, gave the Defendants to understand that the board objected on the ground that buildings according to the plan would make the street too narrow, the board had not done anything to induce the Defendants to believe that they would not prescribe a building line, and that there was no equity to prevent the board from exercising their powers under sect. 155 on the ground that they had misled the Defendants. Newhaven Local Board *v.* Newhaven School Board - - - - - **C.A. 350**

—— Vestry—Compulsory powers—Severance **642**
See Vestry.

LUNATIC—*Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 3—*Inquiry when Lunacy commenced.*] The Lunacy Regulation Act, 1862, s. 3, takes away the power existing under the Lunacy Regulation Act, 1853, s. 47, of directing an inquiry from what time an alleged lunatic has been of unsound mind.—Opinion expressed by James, L.J., in *In re Sottomaior* (Law Rep. 9 Ch. 677) dissented from. *In re* Danby - **C. A. 320**

MANOR - - - - - **581**
See Copyhold.

MEMORANDUM OF ASSOCIATION—Alteration of - - - - - **376**
See Company. 3.

MINE—Under railway - - - **634**
See Railway Company.

MISTAKE—Order of Court—Amendment **239**
See Practice. 6.

MORTGAGE—*Benefice with Cure—Charge*—13 *Eliz. c.* 20—*Union of Benefices Act*, 1860 (23 & 24 *Vict. c.* 142)—*Compensation payable to retiring Incumbent.*] In pursuance of an Order in Council under the Union of Benefices Act, 1860, uniting two City benefices, certain annuities were granted to the retiring incumbent and his assigns out of the annual income of the united benefice, and made a first charge thereon during the joint lives of himself and the incumbent of the united benefice, so long as he should perform in person, or by substitute to be approved of by the bishop, the duties of curate of the united benefice under the style of vicar in charge, with a provision for the retiring incumbent after the death of the incumbent of the united benefice:—*Held*, that such annuities were not a benefice with cure within 13 Eliz. c. 20, and accordingly could be validly mortgaged by the retired incumbent. McBean *v.* Deane - - - - **520**

2. —— *Equitable Charge by Deposit of Deed—Invalid Transfer of Charge—Right to Deed.*]

MORTGAGE—*continued.*
Equitable mortgagee by a deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed; and as his interest in the deed is only incidental to his interest in the mortgage, the donee of the deed has no right to retain it. *In re* RICHARDSON. SHILLITO *v.* HOBSON - C. A. 396

3. —— *Mortgagees in Possession—Account of Rents and Profits—Liberty to surcharge.*] The Defendants had by the judgment in the action been held to be mortgagees in possession of certain mortgaged estates, and the usual accounts and inquiries as against mortgagees in possession were directed. The Defendants brought in an account purporting to shew their receipts in respect of the rents and profits of the mortgaged estates, but which in fact only shewed certain lump sums received by them from one J. H. Blood, then deceased, their agent.—On motion by the Plaintiff for a further and better account:—*Held*, by Pearson, J., that the account was sufficient and that the Plaintiff's proper course was to surcharge the Defendants:—*Held*, by the Court of Appeal (reversing the decision of Pearson, J.), that the Defendants were bound to render the further account, for that the receipts of Blood were as between the Plaintiff and the Defendants the receipts of the Defendants; the Defendants were bound to deliver an account shewing not only what they had received from Blood but what he had received from the tenants, and that it was a question not of technicality but of substance, for without the knowledge derived from such an account the Plaintiff would be unable to proceed on the inquiry as to wilful default, which was a matter of surcharge, and that the death of the Defendants' agent could not excuse the Defendants from this liability. NOYES *v.* POLLOCK [C. A. 336

4. —— *Share of Partnership—Foreclosure—Date at which Account of mortgaged Share is to be taken—Form of Order.*] When a partner mortgages his share in the partnership, and the mortgagee brings an action to realise his mortgage, the proper order is to direct an account of what the mortgagor's interest in the partnership was at the date when the mortgagee proceeded to take possession under his mortgage, i.e., at the date of the writ; but if a dissolution of the partnership has previously taken place, the date of the dissolution is the date at which the account is to be taken. WHETHAM *v.* DAVEY - - 574

—— Devise of mortgaged estate—Keeping down interest - - - - 614
See WILL. 6.

—— Payment off—Authority of solicitor to receive money - - - - 249
See SOLICITOR. 1.

—— To be paid off out of accumulations of rents
See ACCUMULATIONS. [649

MORTGAGEE IN POSSESSION - - 336
See MORTGAGE. 3.

MORTMAIN - - - - - - 544
See CHARITY.

MUTUAL CREDITS - - - - 216
See COMPANY. 1.

NEXT FRIEND—Infant—Production of documents - - - - - 189
See PRACTICE. 2.

—— Married woman suing as feme sole - 418
See PRACTICE. 5.

NEXT OF KIN—Appointment to - - 186
See POWER. 1.

NOTICE TO TREAT - - - - - 553
See LANDS CLAUSES ACT.

ONEROUS PROPERTY - - - - 614
See WILL. 6.

OPTION OF PURCHASE—Conversion—Election
See ELECTION. [654

—— Transmission of right to executors - 203
See WILL. 7.

ORDER AND DISPOSITION - - 261
See BANKRUPTCY. 1.

ORIGINAL WILL—Right to look at - 390
See WILL. 1.

ORIGINATING SUMMONS—Appeal - 231
See PRACTICE. 7.

PAID-UP SHARES—Contract for - - 153
See COMPANY. 4.

PARCELS—Description of advowson - 298
See ADVOWSON.

PARTIES—Married woman suing as feme sole
See PRACTICE. 5. [418

PARTNERSHIP—Mortgage of share - 574
See MORTGAGE. 4.

PAYMENT OUT OF COURT - - - 541
See PRACTICE. 8.

PENDING ACTION—Sale under Settled Land Act - - - - - - 531
See SETTLED LAND ACT. 3.

PEPPERCORN RENT - - - 344
See VENDOR AND PURCHASER. 2.

PERPETUITY—Appointment - - 172
See POWER. 2.

POWER—*Contingent Exercise.*] An appointment to an object of a power for life with remainder to his next of kin will take effect if at the death of the tenant for life his next of kin are objects of the power. *In re* COULMAN. MUNBY *v.* ROSS [186

2. —— *Exercise—Special Power—Exercise by Will—Bequest of all Property over which Testator at the Time of his Death should have "any beneficial disposing power by will"—Remoteness—Intervention of Trustees.*] A testator, who had under a settlement a power of appointment over leasehold and other personal estate among his children or grandchildren or other issue, by his will, which contained no reference to the power, gave "all the real and personal estate and effects whatsoever, and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease, I shall have any beneficial disposing power by this my will" to trustees, upon trusts partly for persons who were objects of the power, and partly in excess of the power:—*Held*, that the use of the word "beneficial" did not conclusively shew that the testator could not have intended to exercise a power which he could not

POWER—*continued.*
exercise for his own benefit or the benefit of his estate.—*Ames* v. *Cadogan* (12 Ch. D. 868) discussed.—There being, in the opinion of the Court, upon the will taken as a whole, a sufficient indication of an intention to exercise the power:—*Held*, that the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative.—The testator gave a moiety of the property on trust for his daughters who should survive him, and attain twenty-four, in equal shares. The testator's youngest daughter was more than three years old at the time of his death:—*Held*, that the appointment was not void for remoteness.—*Held*, also, that the appointed fund ought to be retained by the trustees of the settlement on the trusts of the will, so far as they were valid. Von Brockdorff *v.* Malcolm 172

3. —— *Exercise—Special Power—Exercise by Will—Intention.*] If a testator manifests an intention to exercise by his will a special power of appointment, by reason of his making some gifts of property which he describes as "my" property, but the words of which gifts cannot be satisfied unless they pass property subject to the power, the Court will assume that he intended also to exercise the power in the case of other gifts in the will which are capable of passing other property subject to the power, although the words of gift can be satisfied by means of property belonging to the testator himself.—A testator had under a settlement a special power to appoint by will two estates at B. and at S. respectively, and also some shares in the B. Colliery. By his will he made gifts of "my estate at B." and of "my estate at S.," and he made another gift of "all my share and interest in the B., H., and W. Colliery Companies." He had no property of his own at either B. or S., but he had some shares of his own in the B. Colliery:—*Held*, that the will operated as an exercise of the power, not only as regarded the estates at B. and S., but also as regarded the settled shares in the B. Colliery. *In re* Wait. Workman *v.* Petgrave - 617

PRACTICE—*Appeal by Person not a Party—Rules of Supreme Court*, 1883, *Order* xvi., *r.* 40—*Setting aside Judgment obtained by Collusion.*] D., the residuary legatee of Mrs. Y., brought her action for administration of Mrs. Y.'s estate against R., the surviving executor. Mrs. Y. had been the surviving executrix of her husband. V., one of the residuary legatees of the husband, shortly afterwards brought her action against R. as sole Defendant, for administration of the husband's estate, alleging breaches of trust by Mrs. Y., and asking administration of her estate if R., as her representative, did not admit assets to pay what should be found due from her estate to the husband's estate. On the 28th of February, 1885, V. moved for judgment. There was no evidence before the Court that Mrs. Y. was indebted to her husband's estate, or that she had been guilty of wilful neglect and default. R., by his counsel, admitted that she was so indebted, and he submitted to a judgment directing an account of personal estate of the husband which she had received, or but for her wilful neglect or default might have received, with an inquiry as to balances in her hands, and directing administration of her estate. It appeared that, from information R. had received, he felt sure that Mrs. Y. would be found a debtor to her husband's estate, and that wilful default would be established against her, and that it was not advisable to incur the expense of contesting these points at the hearing. D., on the 26th of June, 1885, moved before Pearson, J., under Order xvi., r. 40, to discharge or vary the judgment of February, 1885. This motion was refused on the ground that D. had not been served with the judgment. D. appealed from this refusal and also applied for leave to appeal from the judgment:—*Held*, that leave cannot be given to a residuary legatee to appeal from a decree made against the executor at the suit of a creditor, as the executor completely represents the estate for the purposes of such a suit, and the residuary legatee could not be made a party to the suit, and the case is quite different from one where leave to appeal is applied for by a person who, though not according to the present practice a necessary party to the suit, would have been a proper party to it:—*Held*, further, that the application of June, 1885, to vary the judgment was not supported by Order xvi., r. 40, the case not falling within that rule, which only applies to cases where service of an order is necessary in order to make it binding, whereas here the order was binding without service, and D. was not a proper person to be served:—*Held*, further, that although R. might have acted injudiciously in submitting in February, 1885, to an order which went further than any order that could have been made adversely on the materials before the Court, the order could not be discharged unless the Court was satisfied that R. had submitted to it fraudulently in collusion with V., and in this case the Court was satisfied that R. had acted bonâ fide. *In re* Youngs. Doggett *v.* Revett. *In re* Youngs. Vollum *v.* Revett - - - - C. A. 421

2. —— *Infant—Next Friend—Affidavit as to Documents — Rules of Supreme Court*, 1883, *Order* xxxi., *r.* 12.] The Court refused either to order the next friend of an infant Plaintiff to make an affidavit as to documents, or stay the action till he made such affidavit.—*Higginson* v. *Hall* (10 Ch. D. 235) dissented from. Dyke *v.* Stephens - - - - - 189

3. —— *Jurisdiction—Chancery Action—Subject-matter below £10 in Value—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 25, 34.] An action in the High Court, claiming relief which, before the Judicature Act, could have been given only by the Court of Chancery, cannot now be maintained if the subject-matter is below £10 in value.—The old rule of the Court of Chancery in this respect still remains in force. Westbury-on-Severn Rural Sanitary Authority *v.* Meredith - - - - - C. A. 387

4. —— *Married Woman—Action by Executrix and her Husband—Bankruptcy of Husband—Dismissal of Action with Costs—Liability of Husband for the Costs—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] A feme coverte sued as executrix, and (the action being brought before the Married Women's Property Act, 1882, came into operation) her husband was joined as co-Plaintiff. After

PRACTICE—*continued.*

the action was set down, but before trial, the husband filed a liquidation petition, and obtained his discharge thereunder. When the action came on for trial the Plaintiffs did not appear, and the action was dismissed with costs;—*Held* (affirming the judgment of Pollock, B., for Pearson, J.), that the husband, who had no beneficial interest which could pass to the trustee under his liquidation, having allowed the action (which was a continuing action after his liquidation) to come on for trial, was liable for the costs.—*Semble*, per Lindley, L.J.:—A possibility of having to pay costs is not a debt provable in bankruptcy, though it may in some cases be a "contingent liability." VINT *v.* HUDSPITH - C. A. 24

5. —— *Married Woman suing without Husband or Next Friend—No Separate Estate—Security for Costs of Action—Married Women's Property Act*, 1882, *s.* 1, *sub-s.* 2—*Rules of Supreme Court*, 1883, *Order XVI., r.* 16.] A married woman being empowered by sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882, to sue as a feme sole, may sue without her husband or a next friend, and cannot be ordered to give security for the costs of the action, even although she have at the time of action no separate estate, and there be nothing upon which, if she fails, the Defendant can issue available execution. *In re* ISAAC. JACOB *v.* ISAAC - - C. A. 418

6. —— *Order—Correcting Error in Order—Order passed and entered—Order not conformable to what the Court intended.*] An order of the Court of Appeal was drawn up, passed and entered, in such a form that it might be contended to decide questions which had not been before the Court, and which it had not intended to decide:—*Held*, that the Court had jurisdiction to alter the record of its order, so as to make it conformable to the order which the Court had pronounced, and the record was altered accordingly, but as the applicant had not adopted the usual and proper course of applying to vary the minutes, he was ordered to pay the costs of the application. *In re* SWIRE. MELLOR *v.* SWIRE [C. A. 239

7. —— *Originating Summons—Dismissal of—Time for appealing—Rules of Supreme Court*, 1883, *Order LVIII., r.* 15; *Order L., r.* 1; *Order II., r.* 1; *Order LV., r.* 3; *Order LXXI., r.* 1—*Judicature Act*, 1873, *s.* 100.] An originating summons taken out under Order LV., r. 3, is a civil proceeding commenced otherwise than by writ in manner prescribed by a Rule of Court, and is consequently an action within the definition of that word in sect. 100 of the Judicature Act, 1873. Therefore an order made upon such a summons is appealable at any time within one year from its date. *In re* FAWSITT. GALLAND *v.* BURTON - - - - - C. A. 231

8. —— *Payment out of Court—Permanent Investment—Settled Land Act*, 1882, *s.* 25 (iv.)—*Rules of Supreme Court*, 1883, *Order LV., r.* 2, *sub-r.* 7.] In applications for payment out of Court and investment under the Settled Land Act, 1882, of funds in Court representing the purchase-money of lands taken under the provisions of the Lands Clauses Act, 1845, the Court has a discretion under the Rules of Supreme Court, 1883, Order

PRACTICE—*continued.*

LXX., rule 1, and, where an application by petition is cheaper and more expeditious than by summons, will not disallow the costs of a petition, although the proceeding falls within the Rules of Supreme Court, 1883, Order LV., r. 2, sub-r. 7, as business to be transacted in Chambers.—In such cases, however, the option of proceeding by petition or summons is at the applicant's risk. *In re* BETHLEHEM AND BRIDEWELL HOSPITALS [541

9. —— *Production of Documents—Arbitration—Shorthand Notes of Evidence and Arguments—Transcript, Production of—Privilege.*] The corporation of P. took compulsorily some of R.'s land, and at an arbitration to ascertain the sum to be paid, R. claimed a right of way over other land to a river, and such alleged right had to be considered in regard to the sum to be assessed.—R. employed a shorthand writer to take notes of the evidence and arguments, and afterwards had them transcribed for his own purposes. Subsequently he brought an action for a mandatory injunction to compel the corporation to remove materials which they had put on the land over which he claimed the right of way. The relevancy of the notes was admitted. On motion by the corporation for the production of the transcript, R. objected on the ground that it was privileged, as the notes were taken at his expense and in anticipation of other proceedings against the corporation:—*Held*, that the transcript of the notes was not privileged, and that it must be produced. RAWSTONE *v.* PRESTON CORPORATION - - 116

—— Administration order—Disputed debt 291
See LIMITATIONS, STATUTE OF.

—— Amendment—Adding plaintiffs - 57
See HUSBAND AND WIFE. 4.

—— Foreclosure—Form of order - - 574
See MORTGAGE. 4.

PRINCIPAL AND AGENT — Authority to receive mortgage money - - 249
See SOLICITOR. 1.

PRIORITY—Winding-up of company—Directors' fees - - - - - 629
See COMPANY. 2.

PRIVILEGE—Production of documents - 116
See PRACTICE. 9.

PRODUCTION OF DOCUMENTS - - 116
See PRACTICE. 9.

—— Infant—Next friend - - - 189
See PRACTICE. 2.

PUBLIC HEALTH ACT - - - 350
See LOCAL BOARD.

PURCHASE-MONEY—Devise of estate—Ademption - - - - - 92
See WILL. 3.

QUORUM—Local board - - - 350
See LOCAL BOARD.

RAILWAY COMPANY—*Minerals under or near Railway—Mineral Estate intersected by Railway—Right of Owner to work Mines—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77–82.] Sect. 80 of the Railways Clauses Consolidation Act, 1845, applies to minerals lying

RAILWAY COMPANY—*continued.*
more than forty yards from a line of railway, and enables the owner of minerals, whose access to them is cut off, by reason of a railway company having purchased from him the minerals lying under their line of railway, or within forty yards from it, to tunnel under the railway for the purpose of working his minerals which are on the other side of it. And this power extends, not only to minerals in the ordinary sense of the word, but also to such a substance as clay, which is usually worked from the surface.—And by sect. 81 the mineral owner is entitled to be compensated by the company for any additional expense caused by his having to work the minerals in this way.—The Defendant was the owner of the minerals lying in and under a triangular piece of land, which was completely surrounded by three lines of railway belonging to the Plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface of the triangular piece of land, and also the surface of the land on which those parts of the three lines were constructed. The minerals in and under the lands so purchased were not in the first instance purchased by the company. The Defendant, in April, 1885, gave the company notice, under sect. 78 of the Railways Clauses Consolidation Act, 1845, of his intention to work the minerals belonging to him in and under the triangular piece of land, and also under the lines of railway. The company gave the Defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The Defendant then gave the company notice that he intended to work the minerals in and under the triangular piece of land, and for that purpose to enter upon and across the line of railway:—*Held*, that such a mode of working would be a trespass, and that the Defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals in and under the triangular piece of land, and that the company must compensate him for the extra expense of so working. MIDLAND RAILWAY COMPANY *v.* MILES - - 634

REAL AND PERSONAL ESTATE - - 485
See TIMBER.

RECEIVING ORDER - - - 480
See BANKRUPTCY. 2.

RECITALS—Construction of general words 298
See ADVOWSON.

REGISTRATION—Trade-mark - 454, 505
See TRADE-MARK. 1, 2.

REMOTENESS—Appointment - - 172
See POWER. 2.

RENT—Peppercorn rent - - - 344
See VENDOR AND PURCHASER. 2.

RENT-CHARGE—Tithes .. - - 84
See TITHES.

RESTRAINT ON ANTICIPATION - 159, 183
See HUSBAND AND WIFE. 2, 3.

RETAINER—Right of - - - 15
See EXECUTOR.

RIGHT OF ACTION—Covenant—Stranger 57
See HUSBAND AND WIFE. 4.

RULES OF SUPREME COURT, 1883, Order I., r. 1 - - - - - 231
See PRACTICE. 7.

—— **Order II., r. 1** - - - - 231
See PRACTICE. 7.

—— **Order XVI., r. 2** - - - 57
See HUSBAND AND WIFE. 4.

—— —— **r. 16** - - - - 418
See PRACTICE. 5.

—— —— **r. 40** - - - - 421
See PRACTICE. 1.

—— **Order XXXI., r. 12** - - - 189
See PRACTICE. 2.

—— **Order LV., r. 2, sub-r. 7** - - 541
See PRACTICE. 8.

—— —— **r. 3** - - - - - 231
See PRACTICE. 7.

—— —— **r. 10** - - - - 291
See LIMITATIONS, STATUTE OF.

—— **Order LVIII., r. 15** - - - 231
See PRACTICE. 7.

—— **Order LXX., r. 1** - - - 541
See PRACTICE. 8.

—— **Order LXXI., r. 1** - - - 231
See PRACTICE. 7.

SALE—Settled Land Act.
See Cases under SETTLED LAND ACT.

SALVAGE MONEY—Winding-up of company—Running contract - - - 216
See COMPANY. 1.

SECURITY FOR COSTS—Married woman suing as feme sole - - - - 418
See PRACTICE. 5.

SEPARATE ESTATE - 159, 169, 183
See HUSBAND AND WIFE. 1, 2, 3.

SEPARATION DEED - - 57, 143
See HUSBAND AND WIFE. 4, 5.

SERVICE—Notice to treat - - - 553
See LANDS CLAUSES ACT.

SET-OFF—Company—Contract—Winding-up
See COMPANY. 1. [216

SETTING ASIDE JUDGMENT - - 421
See PRACTICE. 1.

SETTLED LAND ACT.—*Heirlooms—Power of Tenant for Life to sell—Leave of the Court—Improvements—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* vii.; *s.* 25, *sub-ss.* i., iii., x., xi., xiii.; *s.* 37—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18). *s.* 7.] A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, and also a power to sell certain settled heirlooms, asked leave of the Court under sect. 37 of the Settled Land Act, 1882, that he might be authorized to sell part of the settled estates, and also a specified portion of the heirlooms; that the money might be paid to the trustees, and that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (1) a larger and better supply of water to a mansion-house; (2) a new and improved system of drainage of the mansion-house; (3) rebuilding of the stables,

SETTLED LAND ACT—*continued.*

which were out of repair; (4) the building of an agent's house; and (5) the building of two cottages.—The trustees submitted that the proposed improvements (except the cottages) were not within the 25th section of the Act of 1882; and, that even if they were the Court would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms:—*Held*, that the proposed outlay was all within sect. 25 of the Settled Land Act, 1882; and would have been authorized without the statute; and leave given to the tenant for life to sell both the settled estates and the heirlooms, and for the application of the proceeds as prayed. *In re* Houghton Estate - - - - 102

2. —— *Heirlooms—Sale*—45 & 46 *Vict. c.* 38, *ss.* 21, *sub-s.* ii., 37, 53—*Application of Proceeds—Discharge of Incumbrances.*] The money arising by the sale, on the application of the tenant for life with the sanction of the Court, of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one. *In re* Duke of Marlborough's Settlement. Duke of Marlborough *v.* Marjoribanks - - - - 127

3. —— *Tenant for Life—Sale*—45 & 46 *Vict. c.* 38, *s.* 3—*Pendency of Administration Action.*] The pendency of an action by tenant for life in which a decree has been made for execution of the trusts of a settlement, does not prevent him from exercising his power of sale under the Settled Land Act, 1882, without the sanction of the Court. Cardigan *v.* Curzon-Howe - - - 531

4. —— *Tenant for Life* (45 & 46 *Vict. c.* 38), *ss.* 51, 58, *sub-s.* 1, *cl. vi.—Person having Powers of Tenant for Life—Conditional Life Estate—Invalidity of Condition—Application of Proceeds of Sale of Estate.*] A testator devised his B. estate to the use of his son, "so long as he shall reside in my present dwelling-house, or upon some part of my B. estate, for not less than three months in each year after he shall become entitled to the actual possession thereof;" and, after the death of the son, provided that he should have complied with the condition, to such uses for the benefit of his children as he should by will appoint; and, in default of such appointment, or, if he should fail in compliance with the above condition, on the determination of his estate therein, to the use of trustees, on trust for sale and distribution of the proceeds of sale among the son's children:—*Held*, that the son had the powers of a tenant for life under the Settled Land Act, and could sell the estate, and that, notwithstanding the condition as to residence, he would, by virtue of sect. 51 of the Act, be entitled to the income of the proceeds of sale during his life. *In re* Paget's Settled Estates - - - - 161

5. —— *Tenant for Life — Persons having Powers of Tenant for Life—Discretionary Trust for Application of Income during Life—Forfeiture in Event of Bankruptcy—Settled Land Act,*

SETTLED LAND ACT—*continued.*

1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 6, 10, *cl.* i. 51, 58, *sub-s.* 1, *cls.* vi. ix.] The words "entitled to possession of settled land for his life," as used in sub-sect. 5 of sect. 2 of the Settled Land Act, 1882, mean entitled "in possession" as distinguished from entitled "in reversion," and the words in sub-sect. 6, "two or more persons so entitled as tenants in common, or as joint tenants," mean entitled "for life."—A testator devised real estate to the use of trustees in fee during the life of his son, on trust to receive the rents, and after payment of costs and outgoings, to hold the residue of the rents upon the trusts thereinafter mentioned. And after the death of the son, to the use of his first and other sons successively in tail male, with remainders over. And the testator directed that his trustees should during the life of the son pay and apply the residue of the rents which should during his life become payable to them in such manner in all respects as they should think best for the maintenance, or otherwise for the benefit of the son and of his wife and his child and children, or for the benefit of any one or more of them, and so that, in case the son should at any time assign, charge, or attempt to anticipate his interest under the will, or should do any act whereby, either directly or by operation of law, he would, if absolutely entitled to such interest, be deprived, or liable to be deprived, of the benefit or enjoyment thereof, then the trust thereinbefore declared in his favour should absolutely cease, and the rents should thenceforth during his life be applied by the trustees, either for the maintenance, support, or benefit of the son, or for such other purposes and in such manner in all respects as the trustees should in their absolute discretion think fit. There being no children of the son and he not having forfeited his interest under the will:—*Held*, that he and his wife did not together constitute a tenant for life of the estate by virtue of sub-sect. 6 of sect. 2 of the Settled Land Act, 1882, and that they had not, by virtue of sect. 58, the powers of a tenant for life under the Act. *In re* Atkinson. Atkinson *v.* Bruce - - - - - 605

6. —— *Title of Dignity or Honour—Incorporeal Hereditament—Land—Heirlooms devolving with Dignity—Sale of Heirlooms—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10, *ss.* 37, 58—*Statute De Donis* (13 *Ed.* 1)—*Statute Westminster Second.*] A dignity or title of honour, as an incorporeal hereditament, is "land" within the meaning of the 37th section of the Settled Land Act, 1882.—When a dignity is limited to the heirs of the body, then although no place be named in the creation of the title, the dignity is within the statute *De Donis*, and descendible as an estate tail, and the patent does not create a fee simple conditional.—There is no difference in these respects between a baronetcy and other descendible dignities. The resolution reported 12 Rep. 81, *held* to be overruled.—The Settled Land Act, 1883, does not enable a limited owner to sell any property which, when vested in a tenant in fee simple, is by law inalienable. *In re* Sir J. Rivett-Carnac's Will - - 136

—— Payment out of Court - - - 541
See Practice. 8.

SETTLEMENT — *After-acquired Property—Covenant—Judicial Separation, Decree for—"Feme Sole"*—20 & 21 *Vict. c.* 85, *ss.* 7, 21, 25, 26.] A married woman, subsequently to obtaining a decree of judicial separation from her husband, became absolutely entitled to certain sums of stock:—*Held*, that under 20 & 21 Vict. c. 85, s. 25, the stock belonged to her as if she were a feme sole, and was not included in a covenant in her marriage settlement to settle all property which she or her husband in her right might acquire "during the coverture." DAWES *v.* CREYKE - - - - - - 500

2. —— *Forfeiture of Interest on Bankruptcy, &c.—Meaning of "forfeited"—Tenant for Life and in Remainder — Insolvency in New South Wales — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 74.] In 1838 a settlement of real estate in England was made, and thereby the trustees were to pay the rents and profits to S. L. for life or until he should commit an act of bankruptcy, or commit any act, or any event should occur, whereby the rents, if settled absolutely upon or in trust for him, should be forfeited to or become vested in any other person whomsoever, and there was a gift over upon the happening of any such event. S. L. in 1875 was residing in New South Wales, and was adjudged insolvent by the Court of the colony, the Act of the colony vesting all property of the insolvent "wheresoever the same might be known or found" in the Commissioner therein mentioned. On summons taken out by S. L. under the Settled Land Act of 1882, to have trustees appointed:—*Held*, that in consequence of the insolvency in New South Wales, the property had become forfeited and had gone over to those in remainder. *In re* LEVY'S TRUSTS [119

3. —— *Forfeiture on Bankruptcy—Discharge of Bankrupt — Life Estate — Reassignment of Estate.*] Under the trusts of a marriage settlement a life interest in property brought into settlement by the wife was given, after her death, to the husband, but the trust in his favour was to cease in the event of his bankruptcy or liquidation and there was a gift over on that event. In August, 1881, he filed a liquidation petition under which, in October, 1881, a trustee of his property was appointed. In January, 1883, he obtained a discharge. In April, 1884, the wife died. In March, 1885, the trustees assigned for value to the debtor all the property belonging to him at the commencement of the liquidation and devolving on him subsequently, up to the date of the discharge, other than that which had been already received by the trustee. The liquidation was never formally closed, but the trustee had never made any claim to the income of the settled fund:—*Held*, that, inasmuch as, before the reassignment by the trustee to the debtor, income had become due to him, which, but for the forfeiture clause, the trustee might have received, the forfeiture had taken effect.—*White* v. *Chitty* (Law Rep. 1 Eq. 372), *Lloyd* v. *Lloyd* (Law Rep. 2 Eq. 722), and *Ancona* v. *Waddell* (10 Ch. D. 157) distinguished. ROBERTSON *v.* RICHARDSON [623

SETTLEMENT OF SHARE - - - 234
See WILL. 5.

SEVERANCE—Compulsory powers of vestry—Part of building - - - 642
See VESTRY.

—— From soil - - - - 485
See TIMBER.

SHARES—Bankruptcy—Order and disposition
See BANKRUPTCY. 1. [261

—— Contract for - - - - 153
See COMPANY. 4.

—— Preference and ordinary - - 376
See COMPANY. 3.

SHORTHAND NOTES—Production of—Privilege
See PRACTICE. 9. [116

SIMILARITY—Trade-mark—Registration 505
See TRADE-MARK. 2.

SOLICITOR—*Agency — Authority of Solicitor to receive Mortgage Money—Possession by Solicitor of Transfer Deed executed by Client.*] G. and H. were mortgagees for £1000 on property of S. Their solicitors, D. & P., who had the deeds in their custody, applied to the Defendant, who was also a client of theirs, saying that they believed he had £1000 to invest on mortgage, and that G. and H. wanted £1000 on a transfer of S.'s mortgage. The Defendant inspected the property, and being satisfied, he, on the 19th of June, 1878, sent the £1000 to D. & P., who gave him a receipt for it. In July, D. & P. fraudulently induced G. and H. to execute a deed of transfer to the Defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. & P. shortly afterwards handed this deed with the title deeds to the Defendant, and went on paying him interest as if they had received it from S. who was in fact paying his interest to the agents of G. and H. G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. & P. became bankrupts, and the £1000 received from the Defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the Defendant, asserting a right against the property in the nature of an unpaid vendor's lien:—*Held*, by the Vice-Chancellor of the county palatine. that on the evidence in the case D. & P. had authority to receive mortgage money on behalf of the Plaintiffs, and must be taken to have received the £1000 on their behalf, and that the action must be dismissed.—On appeal, Cotton, L.J., expressed great doubt (the other Judges giving no opinion on the point) whether D. & P., assuming them to have authority to receive mortgage money on behalf of the Plaintiffs, could be taken ever to have, in fact, received this £1000 on their behalf.—But *held*, by the Court of Appeal, that the decision must be affirmed on the ground that as the Plaintiffs by the deed of transfer and receipt which they handed to D. & P. enabled them to represent to the Defendant that the £1000 which he had previously handed to D. & P. had come to the hands of the Plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. & P. having no authority to receive money for the Plaintiffs) the Defendant had paid the £1000 to D. & P. at the time when the deeds were delivered to him, since he would then have known

SOLICITOR—*continued.*

that the Plaintiffs had not received the money.—*Ex parte Swinbanks* (11 Ch. D. 525) distinguished. GORDON *v.* JAMES - - - C. A. 249

2. —— *Bill of Costs — Agency Charges — Country Solicitor and London Agent—Charge for Counsel's Fees not yet paid.*] London solicitors acted as agents in London for a country solicitor during the years 1877 to 1884 inclusive. The agency was terminated in 1884. During the period of the agency the London agents delivered to the country solicitor, generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, and all moneys received by them on his behalf, and was debited with all payments made by them to him or on his behalf, and with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account, but the last, was carried on to the next account. Some of the actions continued during several years, and one of them (*Rhodes* v. *Jenkins*) continued during the whole period of the agency, and was not then concluded. After the close of the agency the country solicitor claimed a taxation of the whole of the bills:—*Held*, by Pearson, J., that only those bills which had been delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account and thus paid.—*Held*, by the Court of Appeal, that the bills of costs in *Rhodes* v. *Jenkins* (to which the appeal was limited), notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills could not be treated as one continuous bill at the option of the country solicitor. — The London agents had charged the country solicitor with fees to counsel which had not yet been paid, but the country solicitor had not supplied them with sufficient funds to pay the fees:—*Held*, by Pearson, J., that this charge was not a circumstance sufficient to justify a taxation. *In re* NELSON, SON, & HASTINGS C. A. 1

3. —— *Bill of Costs—"Delivery" of Bill—Condition—Withdrawal—Delivery of Second Bill—Taxation, Common Order for—Practice—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 37.] A solicitor may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully and clearly stated to the client: but if the solicitor has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill.—A firm of solicitors, on being pressed by their clients to send in their bill of costs, delivered a bill accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though if such sum was not paid within eight days, they reserved to themselves the right to withdraw the bill and deliver another. The clients, however, insisting on being furnished with the particulars of further charges, the solicitors wrote withdrawing the bill. The clients then obtained a common order for taxation of that bill, and for delivery and taxation of a further bill.—On motion by the solicitors, Bacon, V.C., discharged the common order on the ground that no bill had been "delivered" within the meaning of sect. 37 of the Solicitors Act, 6 & 7 Vict. c. 73; but ordered the solicitors to deliver a bill within fourteen days, such bill to be taxed.—The solicitors, in pursuance of that order, delivered a second bill, but of a considerably less amount than the first, whereupon the clients appealed to reverse that order and to have it declared that the bill to be taxed was that first delivered:—*Held*, by Cotton and Lindley, L.JJ., discharging the last-mentioned order, that the first bill was conditional, but that the condition was one which a solicitor could not impose on his client, and that therefore the original common order for taxation must stand.—*Held*, also, that the clients should under the circumstances, instead of obtaining the common order to tax, have obtained a special order on petition raising the question as to the right of the solicitors to withdraw their bill: they were therefore allowed no costs of the proceedings in the Court below, but only the costs of the appeal. *In re* THOMPSON - - C. A. 441

4. —— *Bill of Costs—Past Costs—Ex parte Order for Taxation—Motion to discharge—Parol Agreement to pay a Lump Sum—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 4.] Since the Attorneys and Solicitors Act, 1870, a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs is not binding on the client. *In re* RUSSELL, SON, & SCOTT - - - - - - 114

5. —— *Bill of Costs — Reinvestment under Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18)—*Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order of August*, 1882, *rule* 2, *Schedule I., Part I., rule* 11.] Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the Court. The solicitor of the corporation charged the ad valorem scale fee prescribed by the rules under the Solicitors' Remuneration Act, 1881, Schedule I., Part I., "for investigating title and preparing and completing conveyance":—*Held* (affirming the decision of Chitty, J.), that the exception in Schedule I., Part I., rule 11, which provides that the scale shall not apply in case of sales under the Lands Clauses Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, was not applicable to the case.—*Held*, also (approving the decision of Kay, J., in *Stanford* v. *Roberts* (26 Ch. D. 155), that the words of rule 2 "not being business in any action or transacted in any Court or in the chambers of any Judge or Master," apply only to the "other business" mentioned immediately before, i.e., to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the Court.—*Held*, also, that as the purchaser's solicitor had had to do all the things which he would have had to do in a purchase not under

SOLICITOR—*continued.*
the direction of the Court, the case was not taken out of the scale by the fact that, in a purchase under the direction of the Court, he did not incur as much responsibility as in a private purchase:—*Held*, therefore, that the scale fee was properly chargeable. *In re* MERCHANT TAYLORS' COMPANY - - - C. A. 28

SPECIFIC DEVISE—After-acquired property 50
See WILL. 8.

STATUTES:
13 Ed. 1—*Statute De Donis* - - 136
See SETTLED LAND ACT. 6.
13 Eliz. c. 20—*Ecclesiastical Pension* - 520
See MORTGAGE. 1.
7 Anne, c. 5—*Naturalization* - - 324
See INFANT.
4 Geo. 2, c. 21, s. 1—*British Subjects* - 324
See INFANT.
9 Geo. 2, c. 36—*Mortmain* - - 544
See CHARITY.
13 Geo. 3, c. 21, s. 1—*Naturalization* - 324
See INFANT.
57 Geo. 3, c. xxix. ss. 80, 82—*Metropolitan Paving* - - - 642
See VESTRY.
6 & 7 Will. 4, c. 32—*Building Societies* - 434
See BUILDING SOCIETY.
6 & 7 Will. 4, c. 71, s. 67—*Tithe Commutation*
See TITHES. [84
1 Vict. c. 26, s. 24—*Wills* - - - 50
See WILL. 8.
6 & 7 Vict. c. 73, s. 37—*Solicitors* - 441
See SOLICITOR. 3.
8 & 9 Vict. c. 18—*Lands Clauses* - 28
See SOLICITOR. 5.
—— —— ss. 18, 19, 23, 25, 27, 28, 30 - 553
See LANDS CLAUSES ACT.
8 & 9 Vict. c. 20, ss. 77–82—*Railways Clauses*
See RAILWAY COMPANY. [634
20 & 21 Vict. c. 85, ss. 7, 21, 25, 26—*Divorce Court* - - - - 500
See SETTLEMENT. 1.
—— —— s. 25 - - - - 143
See HUSBAND AND WIFE. 5.
23 & 24 Vict. c. 142—*Union of Benefices* 520
See MORTGAGE. 1.
25 & 26 Vict. c. 86, s. 3—*Lunacy Regulation*
See LUNATIC. [320
25 & 26 Vict. c. 89, s. 12—*Companies* - 376
See COMPANY. 3.
—— —— s. 38, sub-s. 7 - - - 629
See COMPANY. 2.
30 & 31 Vict. c. 131, s. 25—*Companies* - 153
See COMPANY. 4.
32 & 33 Vict. c. 71, s. 31—*Bankruptcy* - 24
See PRACTICE. 4.
—— —— s. 39 - - - - 216
See COMPANY. 1.
—— —— s. 74 - - - - 119
See SETTLEMENT. 2.
33 & 34 Vict. c. 28, s. 4—*Attorneys and Solicitors* - - - - - 114
See SOLICITOR. 4.

STATUTES—*continued.*
36 & 37 Vict. c. 66, ss. 16, 25, 34—*Judicature*
See PRACTICE. 3. [387
—— —— s. 100 - - - - - 231
See PRACTICE. 7.
37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* - - - - 291
See LIMITATIONS, STATUTE OF.
38 & 39 Vict. c. 55, ss. 155, 158; Sched. I., rr. 2, 9; Sched. II., Part I., r. 65; Part II., r. 2—*Public Health* - - 350
See LOCAL BOARD.
38 & 39 Vict. c. 91, ss. 2, 3, 4, 5, 10—*Trade-marks* - - - - 454
See TRADE-MARK. 1.
39 & 40 Vict. c. 33, s. 1—*Trade-marks* - 454
See TRADE-MARK. 1.
44 & 45 Vict. c. 41, s. 3, sub-ss. 4, 6—*Conveyancing and Law of Property* - 344
See VENDOR AND PURCHASER. 2.
—— —— —— sub-s. 6 - - - 42
See VENDOR AND PURCHASER. 1.
44 & 45 Vict. c. 44, s. 2—*Solicitors' Remuneration* - - - - - 28
See SOLICITOR. 5.
45 & 46 Vict. c. 38, s. 2, sub-ss. 5, 6, 10, cl. 1, 5, 58, sub-s. 1, cls. vi., ix.—*Settled Land*
See SETTLED LAND ACT. 5. [605
—— —— s. 2, sub-s. 10; ss. 37, 58 - 136
See SETTLED LAND ACT. 6.
—— —— s. 3 - - - - 531
See SETTLED LAND ACT. 3.
—— —— ss. 21, sub-s. ii., 37, 53 - 127
See SETTLED LAND ACT. 2.
—— —— s. 21, sub-s. vii.; s. 25, sub-ss. i., iii., x., xi., xiii.; s. 37 - - - 102
See SETTLED LAND ACT. 1.
—— —— s. 25 (iv.) - - - 541
See PRACTICE. 8.
—— —— ss. 51, 58, sub-s. 1, cl. vi. - 161
See SETTLED LAND ACT. 4.
45 & 46 Vict. c. 75, s. 1, sub-s. 2—*Married Women's Property* - - - 418
See PRACTICE. 5.
—— —— —— sub-s. 4 - - - 169
See HUSBAND AND WIFE. 1.
46 & 47 Vict. c. 52, s. 9—*Bankruptcy* - 480
See BANKRUPTCY. 2.
—— —— s. 44, sub-s. iii. - - - 261
See BANKRUPTCY. 1.
46 & 47 Vict. c. 57, s. 62—*Trade-marks* - 505
See TRADE-MARK. 2.
47 & 48 Vict. c. 18, s. 7—*Settled Land* - 102
See SETTLED LAND ACT. 1.

SUB-MORTGAGE—Improper investment - 490
See TRUSTEE.

SUMMONS—Originating—Appeal - - 231
See PRACTICE. 7.

SURCHARGE—Mortgagee in possession - 336
See MORTGAGE. 3.

SURETY—Bond by—Mortgage - - 291
See LIMITATIONS, STATUTE OF.

TAXATION—Solicitor's bill of costs.
See Cases under SOLICITOR. 2—5.

TELEGRAPH—Address—Trade-name - 156
See Trade-name.

TENANT FOR LIFE—Mortgage to be paid off out of accumulations—Rights of tenant for life - - - - - - 649
See Accumulations.

—— Mortgaged estate—Keeping down interest
See Will. 6. [614

—— Settled Land Act.
See Cases under Settled Land Act.

—— Windfalls - - - - 485
See Timber.

TESTAMENTARY POWER - - 172, 617
See Power. 2, 3.

TIMBER—*Windfalls—Larch Trees—Real and Personal Estate—Tenant for Life.*] A testator devised estates upon which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales.—It was *held* by Pearson, J., that as between the devisees and the executors of the testator the trees which had been blown down to such an extent that they could not grow as trees usually grow were severed and belonged to the executors, and that the trees which were merely lifted but would have to be cut for the proper cultivation of the plantations belonged to the devisees:—But, *held*, by the Court of Appeal, in allowing an appeal, that, having regard to the maxim "quicquid plantatur solo, solo cedit," the principle applicable was that if a tree was attached to the soil it was real estate, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree. *In re* Ainslie. Swinburn *v.* Ainslie - - - C. A. 485

TITHES—*Tithe Rent-charge—Arrears not recoverable by Sale—Tithes Commutation Act* (6 & 7 *Will.* 4, *c.* 71), *s.* 67.] By the 67th section of the Tithes Commutation Act (6 & 7 Will. 4, c. 71) the sum thenceforth payable in lieu of tithes is declared to be "in the nature of a rent-charge issuing out of the lands charged therewith."—Lands in respect of which a tithe rent-charge was payable having become unproductive, and the remedy by distress and entry having become ineffectual:—*Held*, that the sum payable in lieu of tithes is not by the statute rendered a charge on the inheritance; and that the owner of the rent-charge was not entitled to claim a sale of the lands in order to recover the arrears of his rent-charge. Bailey *v.* Badham - - - - - - 84

TITLE—Evidence of—Leasehold—Peppercorn rent - - - - - 344
See Vendor and Purchaser. 2.

TITLE DEEDS—Right to retain - - 396
See Mortgage. 2.

TITLE OF DIGNITY—Heirlooms - - 136
See Settled Land Act. 6.

TRADE-MARK—*Registration for entire Class of Goods—Five Years' Registration—User for part of Class only—Exclusive Title for Entire Class—Assignment—Goodwill—Infringement—Rectification of Register—Limitation to Part of Class—Trade-marks Registration Act*, 1875, *ss.* 2, 3, 4, 5, 10—*Trade-marks Registration Amendment Act*, 1876, *s.* 1.] An assignee of the goodwill of a business with the right to a trade-mark which has been registered by the assignor under the Trade-marks Registration Act, 1875, in respect of an entire class, but of which the articles dealt with in such business form part only, is not entitled to the exclusive user of the trade-mark for the entire class, but only for the particular articles in connection with which it is actually used, even though the trade-mark may have been on the register for five years.—Sects. 3 and 4 of the Trade-marks Registration Act, 1875, do not confer on the first or subsequent registered proprietor of a trade-mark who has been on the register for five years the absolute right to the exclusive use of his trade-mark as against all the world: the intention of the sections is merely to afford him assistance in bringing an action for infringement by dispensing with the necessity of his adducing evidence in that action of exclusive user; and the sections are no bar to an application under sect. 5 to rectify the register on the ground that the trade-mark is improperly on the register or should be restricted to certain goods.—*Semble*, it is not the intention of the Act that a man registering a trade-mark for an entire class, and yet only using it for one description of goods in that class, shall be able to claim for himself the exclusive right to use it for every description of goods in that class. If he desires to extend his business and apply his trade-mark to a new description of goods in the class, he should have his trade-mark registered in respect of those goods.—*Quære*, whether a man can claim the exclusive use of a registered trade-mark not in actual use in connection with particular goods at the time of registration.—In 1883 E. purchased and took an assignment of the goodwill of the business of an iron merchant and manufacturer, and also of the right to a trade-mark, consisting of a device of Neptune holding a trident with the word "Neptune" added, which had been registered by the assignor in 1878, under the Trade-marks Registration Acts, 1875 and 1876, for the whole of Class 5, described in the *Trade-marks Journal* as "unwrought and partly wrought metals used in manufacture," E. duly getting himself registered as proprietor of the trade-mark. The only business actually carried on by E. and his assignor was and had been that of a manufacturer of iron sheets. In 1880 D. registered a trade-mark bearing the word "Neptune" for "steel wire and iron wire" in Class 5, his business consisting solely of the manufacture and sale of wire. In 1884 E. brought an action against D. for infringement on the ground of the alleged similarity of D.'s trade-mark. D. then applied by summons under sect. 5 of the Act of 1875 to have the register rectified by limiting E.'s trade-mark to the articles in Class 5 other than steel and iron wire:—*Held*, in the action, reversing A. L. Smith, J., that inasmuch as the goods sold by E. and D. were entirely distinct, E. was not entitled to an injunction;—*Held*, also, upon the summons (affirming Bacon, V.C., with a variation), that, notwithstanding the five years' registration of E.'s trade-mark for the whole of Class 5, his trade-mark must be limited to those articles in the class in connection with which it was being

TRADE-MARK—*continued.*
actually used, namely, iron sheets. Edwards *v.* Dennis. *In re* Edwards' Trade-mark C. A. 454

2. —— *Registration — Similarity—Old Mark —Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 62.] An application made in November, 1884, by an American firm of oil manufacturers for the registration under the Act of 1883 of a trade-mark for illuminating oils, which mark had been used by them in America since 1872, and had been known in England as the "White Rose" mark prior to 1875, was refused by the Comptroller upon the ground that there had been on the register since 1878 a similar mark for illuminating oils called the "Rosaline" mark, of which an English firm were the proprietors:—*Held*, that although there was enough similarity between the two marks to render it possible for the public to mistake the one for the other, yet as the "White Rose" was to all intents and purposes an old mark, it ought to be admitted to registration. *In re* "White Rose" Trade-mark - - - - 505

TRADE NAME—*Jurisdiction—Injunction—Telegraphic Address.*] The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co. of Cornhill. A bank adopted by arrangement with the Post Office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—*Held*, that the Court had no jurisdiction to restrain the bank from using such cypher address. Street *v.* Union Bank of Spain and England [156

TRANSFER—Equitable mortgage—Deposit 396
See Mortgage. 2.

TRUSTEE—*Investment—Sub-mortgage—Building Estate—Speculative Security—Separate Mortgages —Breach of Trust—Transfer of Securities—Executors — Waiver — Adoption and Acquiescence.*] Under a settlement S. was tenant for life with an ultimate trust, in default of children (which happened), for her testamentary appointees. The trustees, having power to invest on leasehold securities, invested the trust funds, with S.'s consent, on separate sub-mortgages of leasehold houses, unfinished and unlet, on a building estate of which the roads and drainage were in a defective condition. The investment was made without an independent or reliable valuation, and more than half the value of the house was lent on each sub-mortgage. S. died, having by will disposed of the trust funds and appointed executors. The executors, with the sanction of the Chief Clerk in an action establishing S.'s testamentary appointment, had the sub-mortgages transferred to them by the trustees, and subsequently, finding them an insufficient security, brought an action against the trustees to make them personally liable for the deficiency:—*Held*, that, although the sub-mortgages were not improper investments in point of form, the trustees, having invested the trust funds on insufficient security of a speculative character, and without proper precautions, must make good the loss; and that the executors, having taken the transfers in ignorance of the circumstances attending the investment, were not bound by adoption or acquiescence. Smethurst *v.* Hastings - - - - - 490

TRUSTEE—*continued.*
—— Appointment to—Remoteness - 172
See Power. 2.
—— Costs—Married woman - - 159
See Husband and Wife. 3.

TURNPIKE BONDS—Real security—Construction of will - - - - 227
See Will. 9.

UNDERLEASE—Covenants of lease - 404
See Landlord and Tenant.

USER—Trade-mark—Part of class - 454
See Trade-mark. 1.

VENDOR AND PURCHASER—*Abstract of Deed not in Vendor's Possession—Expense of making—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.] A vendor is bound at his own expense to produce to the purchaser a proper abstract of title, either for the statutory period of forty years, or for such other period as may be agreed upon, and sect. 3, sub-sect. 6 of the Conveyancing Act, 1881, is not intended to interfere with the performance by the vendor of that duty, but proceeds on the assumption that the vendor has produced such an abstract.—Therefore on an open contract the vendor must bear the expense of procuring and making an abstract of any deed forming part of the forty years' title, although such deed be not in his possession.—The word "abstract" in that sub-section is to be distinguished from the "abstract" of title to which the purchaser is entitled; and a purchaser cannot be said to "require an abstract of a particular deed," merely because he requires an abstract of title for the prescribed length of time, which involves the abstracting of that deed.—Decision of Pearson, J., reversed. *In re* Johnson and Tustin C. A. 42

2. —— *Peppercorn Rent—Evidence of Title—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 4, 6.] The Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent, so as by the production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of shewing, that the covenants with their lessor (to finish the house within —— months to the satisfaction of the lessor's surveyor) have been duly performed and observed.—The certificate of the lessor's surveyor that the house has been finished to his satisfaction, is not a "certificate" or "evidence" within sect. 3, sub-sect. 6, the expense of obtaining which must be borne by the purchaser, but it is part of the title itself.—Decision of Chitty, J., affirmed. *In re* Moody and Yates' Contract - - C. A. 344

VESTING - - - - - 507
See Will. 10.

VESTRY—57 *Geo.* 3, *c. xxix., ss.* 80, 82—*Compulsory Purchase—Severance.*] A metropolitan vestry required, for the purpose of widening a street, a part of the buildings and site of an orphanage that would leave a substantial portion of the premises:—*Held*, that (the owners wishing to sell the part required only) the vestry could not take the whole. Teuliere *v.* Vestry of St. Mary Abbotts, Kensington - - - - - 642

WILL—*Blank in Will—Right of Court to look at Original Will.*] A testatrix in making her will used a law stationer's form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named, the testatrix gave all her property both real and personal "unto
to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece Catherine Hellard to be executrix of this my last will and testament":—*Held*, by Kay, J., and by the Court of Appeal, that there was an effectual gift of the residue to Catherine Hellard.—Per Lord Esher, M.R., and Baggallay, L.J.:—For the purpose of construing a will the Court is entitled to look at the original will as well as at the probate copy. *In re* Harrison. Turner *v.* Hellard [C. A. 390

2. —— *Cousins—First and Second Cousins—Gift over—Death before Payment of any Legacy.*] Testator bequeathed the residue of the proceeds of sale of his real and personal estates upon trust, after the deaths of his wife and sister, to be equally divided amongst all such of his first and second cousins, including his reputed cousin A. B. and his children, or reputed children, and the children of his reputed cousin S. G. deceased as should be then living, and if A. B. should be then dead, the share to which he would have been entitled, if then living, should be divided amongst his then surviving children. And by a codicil, the testator gave a legacy out of the same proceeds of sale "to each of my cousins J. B. and G. C.," in addition to any sum to which they might be entitled under his will, and directed that if any or either of his first or second cousins should die before the payment of any sum or share thereby or by his will directed to be paid to him or her, such sum or share should be equally divided among his or her wife or husband and children or child, if any, and if none should be paid to his or her next of kin. The testator had not, either at the date of his will or at his death, any second cousin, but at the time of his death he had both first cousins and first cousins once removed, and also first cousins twice removed. A. B. and S. G., if they had been legitimate, would have been the testator's first cousins, and J. B. and G. C. were his first cousins once removed:—*Held*, that first cousins once removed and their children were included in the gift:—*Held*, also, that the gift over on death before payment was to be construed as before becoming entitled to payment. Wilks *v.* Bannister 512

3. —— "*Furniture, Goods, and Chattels*"—*Ejusdem Generis—Gift of "all my interest in C. Estate"—Purchase-money—Mixing with Money at Bankers—Deposit—Ademption.*] A testator, after bequeathing pecuniary legacies, directed them "to be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols." And after directing that the whole of his income should be devoted to the comfort and maintenance of his wife, and that she should have the use of his residence, he desired "that the furniture, goods, and chattels be not sold during my wife's lifetime, but at her decease be divided among the executors." And

WILL—*continued.*

after the death of his wife he bequeathed to M. "all my interest in the C. estate."—Prior to the date of the will, the C. estate, which had been appointed by will by the testator's wife to him absolutely, was taken by the M. Board of Works, the purchase-money being paid into Court. Subsequently, the wife died and administration with her will annexed was taken out by the testator, who then conveyed the C. estate to the Board, and obtained payment out to himself of the purchase-money, which he placed with his bankers partly on deposit and partly to his general account with his other moneys, from time to time drawing on that general account. At his death there stood to his credit at his bankers the sum on deposit and a balance on his general account:—*Held*, (1), applying the rule ejusdem generis, that the gift of "furniture, goods, and chattels," passed only such furniture, &c., as, on the house being let furnished, would go with the occupation of the house, and not such articles as jewellery, guns, pistols, tricycles, and scientific instruments; (2), that the gift of "all my interest in the C. estate," had been adeemed and did not pass the money on deposit or any part of the balance at the bankers.—*Clark* v. *Brown* (2 Sm. & Giff. 524) not followed.—*Moore* v. *Moore* (29 Beav. 496) distinguished. Manton *v.* Tabois - - 92

4. —— *Illegitimate Child—Class of Children.*] Testator by his will bequeathed to M. B. B., "daughter of my nephew J. B.," £200; and to T. B., "son of the said J. B.," £100. He directed his trustees to stand possessed of his residue upon trust for "all and every the children and child" of R. C. and J. B. respectively. By a codicil testator revoked the bequest of £200 "to my great-niece," M. B. B., and the bequest of £100 "to my great-nephew," T. B., and instead thereof bequeathed to M. B. B., £100; to T. B., £100; and to A. B., "another daughter of my nephew J. B.," £100.—M. B. B. was illegitimate; T. B. and A. B. were legitimate:—*Held*, that M. B. B. was sufficiently indicated as one of the persons who was to participate in the residue.—*Megson* v. *Hindle* (15 Ch. D. 198) distinguished. *In re* Bryon. Drummond *v.* Leigh - - 110

5. —— *Lapse—Settlement of Shares.*] A testator bequeathed the residue of his estate to trustees upon trust for a nephew and three nieces equally between them, and in case any or either of them should die under twenty-one then he directed that the share or shares of him, her, or them so dying, whether original or accruing, should go to the others or other of them, and if more than one in equal shares: "Provided and I declare that my trustees or trustee shall retain the share of each of my nieces of and in the said trust moneys upon the trusts following." Then followed trusts for the niece for life for her separate use, and after her decease as to the capital upon trust as she should by will appoint, and in default of appointment upon trust for her children who being sons should attain twenty-one, or being daughters attain that age or marry, and in default of such issue upon trust for such persons as should be next of kin to her at her decease. One of the nieces married and died before the testator, leaving a child who survived him:—

WILL—*continued.*

Held (affirming the decision of Pearson, J.), that the share of the deceased niece had lapsed, and that there was an intestacy as to it. *In re* Roberts. Tarleton *v.* Bruton - - C. A. 234

6. —— *Mortgage—Onerous Property—Devise of.*] A testator devised and bequeathed a freehold house and the furniture and effects therein on trust for A. and B. for life. The house was subject to a mortgage for more than its value:—*Held*, that A. and B. were entitled to the use of the furniture without keeping down the interest on the mortgage. Syer *v.* Gladstone - 614

7. —— *Option to purchase—Interest not transmissible to Executors of Person to whom Option is given.*] A testator devised and bequeathed certain real and personal property, including an hotel, to trustees upon trust to pay out of the rents, issues, and income thereof, annuities to his widow and sister, and during their lives and the life of the survivor to divide the residue of the rents, issues, and income equally between his four children; and after the decease of the survivor of his wife and sister he declared that his son should have the option of purchasing the hotel at the price of £10,000, such sum to fall into testator's residuary personal estate; but if the son should decline to purchase the hotel at that price within six months after the decease of the survivor of the testator's wife and sister, he directed that his trustees should sell the hotel, and that the moneys arising from the sale thereof should fall into his residuary personal estate. The son died very soon after his father, the testator, also leaving a will whereby he appointed executors. The testator's wife and sister being also dead:—*Held*, that the option to purchase the hotel was a right personal to the son, and could not be exercised after his death by his executors. *In re* Cousins. Alexander *v.* Cross - - - C. A. 203

8. —— *Specific Devise of "my cottage and all my land at S." "in their present state"—Residuary Devise—Subsequent Contract to purchase a House and Land at S.—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.] A. devised to G. for life, "my cottage and all my land at S.," subject to the stipulation (among others) that the plantations, heather, and furze be all preserved "in their present state," and devised "all other, my freehold manor, messuages, lands, and real estate whatsoever and wheresoever" to trustees upon trust for sale. At the date of his will A. had a small cottage with twenty-two acres of rough land held with it, and he subsequently contracted to purchase from G. a house of considerable size with gardens and land comprising ten acres closely adjoining the cottage and land. The contract was not completed at his death:—*Held*, that a contrary intention within the meaning of the 24th section of the Wills Act was not shewn with sufficient clearness, but that, construing the will as if it had been made on the day of the testator's death, having regard to the circumstances at that date and to the residuary devise, the specific devise more aptly referred to the cottage and rough land, and did not carry the after-acquired property.—The words "all my land at S." would, if used alone, have been sufficient to carry the after-acquired land with the house standing upon it; but upon the authority of *Ewer* v. *Hayden* (Cro. Eliz. 476, 658), by force of the context the word "land" must be taken as confined to lands in contra-distinction from buildings.—Decision of Kay, J., reversed.—*Semble*, per Lindley, L.J.:—Sect. 24 of the Wills Act, which provides that a will shall speak as to the real and personal estate comprised in it (i.e., the will) from the day of the testator's death, leaves open the question whether a particular property passes by the specific or the residuary devise. *In re* Portal and Lamb [C. A. 50

9. —— *Turnpike Road Bonds—Real Security.*] Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—*Held*, that mortgages of turnpike road tolls and mortgages of turnpike road tolls and toll-houses were not mortgages on real security, and did not come within the exception in the bequest.—Decision of North, J., reversed. Cavendish *v.* Cavendish [C. A. 227

10. —— *Vesting—Income until Marriage—Corpus at the Time of Marriage.*] A testatrix by her will, after specific bequests of bonds, gave all the rest of her stocks and shares upon trust to pay the income to G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him:—*Held*, that G. took a vested interest under the gift, and, being of age, was entitled to have the stocks and shares comprised therein transferred to him, although he had not married.—*Batsford* v. *Kebbel* (3 Ves. 363) distinguished.—*In re Bunn* (16 Ch. D. 247) and *Vize* v. *Stoney* (2 D. & Wal. 659; S. C. 1 D. & War. 337) observed upon. *In re* Wrey. Stuart *v.* Wrey - - - - - - 507

—— Gift to charity—Mortmain - - 544
See Charity.

—— Testamentary power - - - 172
See Power. 2.

WINDFALLS - - - - - 485
See Timber.

WINDING-UP - - - - 629
See Company. 2.

WITHDRAWAL—Bill of costs - - 441
See Solicitor. 2.

WORDS—"All my land at S." - - 50
See Will. 8.

—— "Cousins" - - - - 512
See Will. 2.

—— "Forfeited" - - - - 119
See Settlement. 2.

—— "Furniture, goods, and chattels" - 93
See Will. 3.

—— "Real security" - - - 227
See Will. 9.

—— "Situate in parish of D." - - 298
See Advowson.

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN UNIV.